UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MF5685

JABBAR COLLINS

Petitioner,

-against-

ROBERT ERCOLE,

Respondent.

AFFIDAVIT IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS

08-CV-1359 (DLI) (CLP))

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

MONIQUE FERRELL, being duly sworn, deposes and states as follows:

1. I am an Assistant District Attorney in Kings County. I am admitted to practice in the State of New York and before this Court.

2. This affidavit is submitted in opposition to the petition of Jabbar Collins (hereinafter "defendant") for a writ of habeas corpus, dated and submitted by his attorney on March 27, 2008.

3. By agreement with the Attorney General of the State of New York, the District Attorney of Kings County will represent respondent in the above-captioned matter.

4. **Pursuant to the orders of this Court, the undersigned is filing, by ECF, this response, including a Memorandum of Law not in excess of 35 pages in length, on August 28, 2008**.

4. Unless otherwise indicated, the statements contained herein are made upon information and belief, based upon the records and files of the Kings County District Attorney's Office, upon the transcript of defendant's trial, and as may otherwise be specified herein.

5. In compliance with this Court's Order to Show Cause, and in further support of the People's Response in Opposition to the Defense Petition, the undersigned is causing to be delivered to the Court the following:

A. The trial transcript, including pre-trial Wade Hearing and sentencing.[1]

B. Defendant's 1997 Motion to Vacate the Judgment; the People's Responsive Submissions; Defendant's Reply; the Decision Denying the Motion.

C. Defendant's Brief on Direct Appeal and on Appeal From the Decision Denying the 1997 Motion to Vacate the Judgment; the People's Briefs in Response; Defendant's Reply Brief; the Decision and Order Affirming the Judgment; Defendant's Application for Leave to Appeal; The People's Opposition to Leave; The Decision and Order Denying Leave.

D. Defendant's 2006 Motions to Disqualify the District Attorney, etc., and the People's Submissions in Opposition to said Motions.

E. Defendant's April 2006 Motion to Renew His 1997 Motion to Vacate the Judgment of Conviction and his 2006 Motion to Vacate the Judgment.

F. Defendant's March 2006 Motion to Vacate the Judgment of Conviction

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[1] Parenthetical references to pages of particular portions of the record in this Affidavit and in the accompanying Memorandum of Law are identified by "Trial," "Wade Hearing," and "Sentencing."

G. The People's Response in Opposition to the Motion [**APPENDIX I** to this Affidavit].[2]

H. The People's [First] Supplemental Response in Opposition to the Motion [**APPENDIX II** to this Affidavit].

I. Defendant's First Reply (Which Contained An Additional Ground)

J. The People's Second Supplement Response in Opposition to the Motion [**APPENDIX III** to this Affidavit].

K. Defendant's Second Reply.

L. The Decision and Order Denying the Motion [**APPENDIX IV** to this Affidavit].

M. Defendant's Application for Leave to Appeal from the Denial of the 2006 Motion to Vacate; Respondent's Opposition to Leave.

6. The following statements are made upon information and belief, based upon the files and records of the Kings County District Attorney's Office, upon conversations with individuals detailed *infra*, and upon the affidavits and affirmations of persons specified herein.

7. **The Nature of Defendant's Petition**. In seeking a writ of habeas corpus, defendant contends that state courts improperly and erroneously denied his 2006 motion to vacate his 1996 conviction pursuant to C.P.L. § 440.10(3), which motion was based upon the claims, inter alia, that defendant had accumulated newly discovered evidence that the People, at defendant's 1995 robbery-homicide trial, had knowingly used false or misleading evidence and

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[2] For technical reasons, Respondent is unable to incorporate the document included as APPENDIX I into its ECF submission of this Affidavit to this Court. However, Respondent is including that document within the "Courtesy Copy" of said Affidavit, and Respondent notes that the petitioner has previously submitted it to this Court along with his petition.

arguments that had denied defendant a fair trial, in that the People had allegedly entered into secret, coercive cooperation agreements to compel the testimony of three witnesses – Adrian Diaz, Edwin Oliva, and Angel Santos – and had then allegedly failed to disclose and had falsely denied the existence of said agreements.

8. *The People uncategorically denied and continue to deny the allegations. Through its own submissions of evidence, the People established in State Court that defendant had failed entirely to satisfy his burden of establishing these claims, which were grounded on spurious allegations of misconduct and on fraud upon witnesses and the court. The People did not enter into any secret or otherwise undisclosed cooperation agreements with any witness or witnesses; the People did not withhold exculpatory evidence or information from defendant before, during, or subsequent to defendant's trial; the People did not introduce at trial false or perjured testimony; the People did not advance false or dishonest arguments or misstate the evidence; and the People did not lie to or mislead defendant, his counsel, the court, or the trier of fact.*

9. **The Crime and The Police Investigation**

A. Around noon on Sunday, February 6, 1994, during a robbery at 126 Graham Avenue in Brooklyn, defendant Jabbar Collins shot and killed Rabbi Abraham Pollack, and he shot and wounded Paul Avery, an unarmed man who had gone to Rabbi Pollack's aid.

B. Defendant, who resided in the neighborhood with his family, knew that Rabbi Pollack regularly collected rents from the tenants of 126 Graham Avenue on the first Sunday of every month. Defendant told two acquaintances – Edwin Oliva and Charles Glover – that he planned to lay in wait and rob the Rabbi at gunpoint. Glover declined to participate in the robbery. Mr. Oliva had known defendant for

approximately eight years, and he had observed that defendant was customarily armed with a .9-millimeter handgun.

C. Defendant carried out the plan by arming himself with a loaded .9-millimeter handgun and waiting for the Rabbi in the building, where the superintendent – Israel Rosado – observed defendant shortly before the crime. Defendant gratuitously shot the unarmed Rabbi six times at close range, killing him. When Paul Avery, a homeless man whom the Rabbi had allowed to live in the basement, attempted to come to the rescue of the Rabbi, defendant Collins shot Mr. Avery twice in the chest and hip, inflicting near-fatal wounds.[3]

D. Eight nine-millimeter expended shell casings were recovered. Each had been fired from the same weapon, which was never found.

E. The gunfire was heard from inside and outside the building, which focused the attention of others – including Adrian Diaz – in the vicinity of 126 Graham Avenue looked towards the sounds of the shooting from his vantage at a nearby storefront. At the same time, Israel Rosado screamed out a window to his son-in-law, Angel Santos, to call 911, and Santos entered a furniture store at the nearby corner, where he planned to use a telephone and from where he could observe the sidewalks through the front and side windows.

F. Mr. Rosado and Mr. Diaz observed defendant run out of 126 Graham Avenue and run towards the corner furniture store, where Mr. Santos was watching through

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[3] Mr. Avery would not later be able to identify defendant as the shooter.

the front and side windows. Rosado, Diaz, and Santos saw defendant struggle as he ran to put the murder weapon inside the back of his waistband.

G. Louis and Esther Velez had just parked outside the furniture store when they heard cries from a crowd that the fleeing man had shot someone. They watched defendant – whom they would not later be able to identify – race around the corner and disappear into a parking lot behind the furniture store as he tried to put something into his waistband. Mr. Velez followed behind defendant, and he found in the parking lot currency and a money order from a tenant at 126 Graham Avenue that was payable to Rabbi Pollack.[4]

H. The police undertook a detailed investigation of numerous leads provided by known and anonymous sources, which had resulted in the preparation of more than 71 Complaint Follow up (DD-5) Reports that documented every phase of the investigation. Although some sources had speculated that members of the Ashby family had been involved, the police determined that the leads were unfounded.

I. Approximately 10 days after the murder, Adrian Diaz – who had seen defendant emerge at a run from the crime scene – spotted defendant in the neighborhood, and he notified the police. Mr. Diaz then gave a statement concerning his observations of defendant's flight in the moments following the shootings.

J. On February 27, 1994, Edwin Oliva – who had heard defendant plan the armed robbery of Rabbi Pollack – was himself arrested and charged with Robbery in the First Degree. While at the 90th Precinct, Mr. Oliva volunteered that he had

information about the murder, and he gave a written statement detailing that he had participated with defendant in a discussion. Mr. Oliva signed in the presence of an Assistant District Attorney, who notarized the signature.[5] No promises of any nature were made to Mr. Oliva, either before or after he confirmed defendant's identity, selecting his photograph from an array.

K. No agreements were entered into either Angel Santos or Adrian Diaz, both of whom separately viewed first a photo array and then a lineup. Each identified defendant as the man they saw run out of 126 Graham Avenue.

L. On March 9, 1994, following the lineup identifications of defendant, Assistant District Attorney Jon Besunder authorized the police to arrest defendant Collins for the robbery and murder of Rabbi Pollack and for the attempted murder of Mr. Avery.

M. Defendant was charged, by Kings County Indictment Number 2884/94, with two counts of murder in the Second Degree (P.L. § 125.25[1, 3], one count of

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[4] The Velezes accurately described but did not identify defendant.

[5] This ADA was not involved in the homicide investigation or in Mr. Oliva's robbery case. Her sole role in this matter was to notarize Mr. Oliva's signature. There was no other recorded statement by Mr. Oliva, and his written statement was provided to the defense prior to trial. See People's Initial Response [APPENDIX I] at ¶¶ 20.F. through I.

The robbery charge against Mr. Oliva was then handled without regard to the information he had provided implicating defendant and without regard to whether he would testify at defendant's trial. On March 9, 1994, Mr. Oliva – represented by the Legal Aid Society – consented to to be prosecuted by Superior Court Information and pled guilty to attempte robbery in the third degree inr eturn for a promised sentence of 1 and 1-1/2 to three years. Although Mr. Oliva hoped that he would receive some consideration for his pre-plea cooperation in the

Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]), four counts of Robbery in the First Degree (P.L. § 160.15[1-4], three counts of Assault in the First Degree (P.L. § 120.10[1, 3, 4], and one count each of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03), and Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).

10. **Pre-Trial Proceedings, The Trial, and The Verdict**

A. Defendant was represented by assigned counsel Michael Harrison, Esq. [Attorney Harrison]. The defense was provided with the services of private investigator Gerald Crippen. [6]

B. The People were represented by a lead prosecutor, ADA Michael F. Vecchione, and by ADA Stacey M. Frascogna and ADA Charles A. Posner.[7]

C. Supreme Court Justice Francis X. Egitto presided over all phases of the trial.[8]

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homicide investigation, none was offered or given at that time. See People's Initial Response [APPENDIX I] ¶¶ 20.I. through 20.AA.

[6] Mr. Crippen died prior to the filing by defendant Collins of the 2006 motion to vacate at issue in his Habeas Corpus petition. Attorney Harrison recalled to the undersigned [as detailed in APPENDIX I] that Mr. Crippen submitted to the trial court vouchers for his services totaling approximately $3,500. The trial record established that Mr. Crippen went to the crime scene on numerous occasions and discussed the investigation with defendant Collins and with other individuals named by defendant, including members of defendant's family, which lived in the neigborhood of the crime (Trial 57, 138, 287, 421).

[7] Charles Posner left the District Attorney's Office when he was appointed to the New York City Criminal Court bench 1995. Judge Posner died on June 8, 2004, two years prior to defendant's filing of the motion to vacate which is at issue in this Habeas Corpus proceeding, and in which defenant accused Judge Posner of gross misconduct.

[8] Justice Egitto retired from Supreme Court, Criminal Term, trial bench; however, he continues to serve as a Judicial Hearing Officer in Kings County.

D. By letter dated May 10, 1994, ADA Vecchione served on Attorney Harrison, inter alia, seventy-one (71) New York Police Department Complaint Follow Up ["DD-5'] Reports that documented the entire investigation of the crimes with which defendant was charged. The letter further documented the production of the "911 printout" and the "Sprint Report," both of which documented the 911 calls that were received and forwarded to the Police Department on the day of the murder that related to that crime.

E. On information and belief [APPENDIX I] during the year that elapsed before the commencement of the trial on March 6, 1995, the People also provided Attorney Harrison with the recorded tape of the captured 911 calls to the 911 operators, or invited Attorney Harrison to provide a blank tape for copying of same. Based upon ADA Vecchione's routine production of the Sprint Report and the 911 printout, and in light of numerous references throughout defendant's trial by Attorney Harrison as well as by members of the prosecution team to the production of Rosario and Brady material (Wade Hearing 4; T. 58, 85, 96, 100, 138-39, 441), and to the fact that witness Angel Santos saw defendant flee from the crime scene as Santos had picked up a telephone to call the 911 operator (Trial 411, 416, 422, 426-27, 521), the only reasonable conclusion is that the People

disclosed the 911 recording to Attorney Harrison, who was aware of its existence and the defense rights of discovery.[9]

F. The People entered into no undisclosed agreements with *any* witness.

G. The People did not withhold from the defense *any* arguably exculpatory evidence or information.

H. The People did not fail to provide the defense with *any* previously recorded statement of any witness at trial.

I. The defense filed statutory notice of intent to present an alibi defense through the testimony of defendant's mother and the mother of defendant Collins' child.[10] Attorney Harrison then withdrew alibi notice prior to trial.

J. The People served notice of intent to elicit identification testimony from Angel Santos – who knew defendant from the neighborhood and who saw him running from the crime scene moments after hearing gunfire – and Adrian Diaz – who also knew defendant from the neighborhood and who saw defendant running away from the crime scene.

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[9] Defendant conceded that in 1997-98, he acquired from Respondent a copy of the 911 tape pursuant to a series of pro se FOIL requests. This Office had then subsequently lost or inadvertently destroyed its only copy of the tape.

[10] As detailed in APPENDIX I, the trial record reflected that these women and other members of defendant Collins' family were in almost constant attendance at the proceedings, and that they had an intimidating effect on those civilian witnesses for the prosecution who lived in the neighborhood of the crime scene, where defendant's family also resided. Due to threats of violence to and intimidation of civilian witnesses, this Office relocated witensses and members of their families.

K. A Wade Hearing was held on March 2, 1995, following which the court ruled admissible the identification testimony of witnesses Angel Santos and Adrian Diaz.

L. Jury selection commenced on March 6 and concluded on March 7, 1995.

M. The trial proper commenced on March 7, 1995.

N. With regard to witness Edwin Oliva [See APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at ¶ 30A-B], On the evening of March 6, 1996, ADAs Vecchione and Posner met for the first time with witness Edwin Oliva – who was not on the People's witness list because the People had not had an opportunity to speak with him in preparation for trial. Mr. Oliva had been present when defendant Collins planned to rob Rabbi Pollack, and he had given a statement to law enforcement and had testified in the Grand Jury to that effect. Mr. Oliva did not recant or disavow that statement on the evening of March 6, 1995. Albeit he was reluctant to testify against defendant Collins, whom he had known for years, Mr. Oliva nevertheless agreed to testify. On the morning of March 7, 1995, the People added Mr. Oliva's name to the witness list and informed Justice Egitto and Attorney Harrison of the need to reopen the Wade hearing to address the admissibility of Mr. Oliva's identification testimony. The hearing was reopened, and Justice Egitto ruled that Mr. Oliva's prior selection of defendant Collins' photograph from an array had been merely confirmatory; accordingly, Mr. Oliva was allowed to identify defendant during the trial.

O. At the trial proper, Adrian Diaz and Angel Santos identified defendant at the man whom they saw flee from the crime scene, while Edwin Oliva identified

defendant as the man whom he knew to be customarily armed with a .9 millimeter weapon and who had told him of his plan to rob Rabbi Pollock at gunpoint. Israel Rosado testified that he saw defendant in the lobby of the crime scene shortly before he heard gunfire from that location. Other witnesses described a man, consistent in clothing and appearance to defendant, whom they saw flee from the crime scene moments after the sound of the final gunshot. Ballistics evidence established that a single 9-millimeter weapon fired all the shots that struck both victims.

P. The People did not conceal from the defense or the court any material information concerning witnesses Diaz, Santos, and Oliva.

Q. With regard to Edwin Oliva [See APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at ¶ 30A-B]:

i. Mr. Oliva never refused to testify. He was not threatened with any adverse repercussions should he choose not to testify, and he was promised nothing in return for his testimony aside from a letter to the Parole Board documenting the fact of his testimony at defendant's trial and, should he so request, relocation upon his own release from custody.

ii. Mr. Oliva testified in a manner consistent with a sworn statement to law enforcement that had been disclosed to the defense prior to trial concerning having been a party to a discussion between defendant and Charles Glover – Mr. Oliva's brother-in-law – during which defendant outlined his plan to rob Rabbi Pollack at gunpoint of the rent receipts and attempted unsuccessfully to recruit Mr. Glover as an accomplice.

iii. The People disclosed to the defense that Mr. Oliva had been convicted, pursuant to his guilty plea, of attempted robbery in 1994, and that he had been sentenced to a term of imprisonment of 1-1/2 to 3 years. This disclosure was reflected in Attorney Harrison's opening remarks (Trial 148-51), and the People further elicited that history from Mr. Oliva on direct examination (Trial 207-14). The People inadvertently portrayed Mr. Oliva's history as more serious by failing to correct Mr. Oliva's testimony on direct that he had pleaded guilty in 1994 to robbery rather than to *attempted* robbery (Trial 213, 225-26). See APPENDIX I at ¶¶ 20-21.

iv. The People did not elicit from Mr. Oliva a detailed history of his status and movement within the State Department of Corrections system since his 1994 conviction, but Mr. Oliva testified that the year preceding his testimony had included a period of participation in a work release program that had ended shortly before his testimony (Trial 220-22).

v. Attorney Harrison focused on Mr. Oliva's recidivist history (Trial: 225-29), and he argued on summation that Mr. Oliva had testified for the prosecution because he wanted to return to the work release program (Trial: 600-605). ADA Vecchione truthfully refuted the unfounded allegation. See APPENDIX I at ¶¶ 21; APPENDIX II at 6-16; APPENDIX III at 30.

R. With regard to Adrian Diaz [APPENDIX I at ¶¶ 18, 22, 26; APPENDIX II at 17-30; APPENDIX III at 30D, 35]:

i. No threats, promises, or other inducements were made to Mr. Diaz who testified at trial in a manner consistent with his grand jury testimony.

ii. The People disclosed to the defense that Mr. Diaz had been sentenced as a youthful offender on December 15, 1993, to a three-year probated sentence for a misdemeanor drug crime under Kings County Supreme Court Information Number 12753/1993, and that his probation was scheduled to terminate on December 4, 1996. He was on probation when the People located him in Puerto Rico shortly before the crime, and he had agreed to return to Brooklyn, at the People's expense, in order to testify (Trial 104-05, 516).

iii. The People elicited this information from Mr. Diaz on direct examination.

iv. Attorney Harrison's cross-examination of Mr. Diaz made use of the record of his criminal history (Trial 538).

S. The defense initially rested without calling any witnesses. The following day the court permitted the defense to reopen for testimony by defendant, who recounted that at the time of the crime he was in the company of six or more individuals, including his mother and other relatives. The defense then rested for a second time without calling those named alibi witnesses, who were present in the courtroom, to testify.

T. On summation, Attorney Harrison strongly challenged the credibility and reliability of the People's civilian witnesses, including Mr. Oliva, Mr. Diaz, and Mr. Santos. ADA Vecchione responded that Mr. Oliva had been promised nothing more than a letter to the Parole Board stating that he had cooperated in

the prosecution by testifying, and that was insufficient motivation for Mr. Oliva to accuse defendant falsely of planning the armed robbery. Moreover, ADA Vecchione correctly stated, Mr. Oliva had made his original statement to the police without the promise of any consideration whatsoever. Similarly, ADA Vecchione accurately stated that Mr. Diaz had been promised nothing to induce him to testify, while making no reference to Mr. Santos. See APPENDIX I at ¶¶ 28-30.

U. The trial concluded on March 13, 1995. The jury found defendant guilty of two counts of Murder in the Second Degree and one count each of Attempted Murder in the Second Degree, Robbery in the first Degree, Assault in the First Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree.

11. **The 1995 Motion to Set Aside the Verdict Pursuant to C.P.L. § 330.30**

A. At the April 3, 1995 sentencing proceeding, Attorney Harrison asked the court to consider defendant's pro se motion to set aside the verdict on the ground that Attorney Harrison had been ineffective. Defendant Collins claimed that Attorney Harrison (i) should have prevailed in suppressing the identification testimony of witnesses Angel Santos and Adrian Diaz, because defendant was not represented by counsel when they identified him at a lineup procedure; (ii) did not effectively cross-examine witness (and victim of the attempted murder) Paul Avery about inconsistencies between his pretrial statement and his testimony, relevant to whether he had cut the perpetrator with a knife during a struggle; (iii) did not cross-examine the detective who investigated the murder concerning a DD-5

report of a statement by a (non-testifying) witness who believed that she may have seen the perpetrator shortly after the crime holding his back and with blood on his hand and jacket, and (iv) did not cross-examine the detective concerning DD-5 reports documenting that the police had conducted a "city-wide hospital canvass for a male black with stab wounds"; (v) introduced into evidence the photo array when defendant's photograph conveyed that defendant had a criminal history; (vi) did not prepare/present an alibi defense based upon defendant's testimony that he was with "up to six witnesses" at the time of the crime," when counsel had interviewed three of those witnesses "who were willing to testify" for defendant," and when three other witnesses had "made attempts to contact defense counsel through the Private Investigator working for counsel." Defendant orally added two additional grounds: that he had been denied counsel at the lineup procedures and that the evidence of his guilt was not legally sufficient (Sentence 8-9).

B. Assistant District Attorney Michael Vecchione orally opposed the motion because Attorney Harrison was an experienced homicide defense attorney who had performed in an exemplary fashion throughout the proceedings. ADA Vecchione noted that Attorney Harrison consulted with defendant Collins regarding every matter, and that it was inconceivable that Attorney Harrison had taken it upon himself to withdraw alibi notice and to rest without calling defendant Collins as a witness (Sentence 12-13). ADA Vecchione further argued that several of the alleged alibi witnesses – including defendant's mother – were in the courtroom throughout the trial, including on the day when the defense originally rested and

on the day when the defense case reopened for defendant's testimony, and that the decision not to put them on the stand was strategy on the part of the defendant and his attorney after consultation with each other and with the defendant's family. Mr. Harrison I saw in consultation with Mrs. Collins many, many times during the course of this trial, including conversations that she had with him and an investigator (Sentence 13-14).

C. The court denied the motion to set aside the verdict (Sentence 17-18). The court observed that, when the defense originally rested without presenting a case, it had elicited directly from defendant his understanding that he was giving up the right not only to testify but also to call witnesses on his behalf (Sentence 10-11). The trial court also noted that two of the alleged witnesses, defendant's mother and Louisa Lopez, were frequently present during the trial, and that the other alleged alibi witnesses included members of defendant's immediate family who had also been present and available at various time. Finally, the court concurred with ADA Vecchione that defendant had been very involved in the conduct of his own defense, and that Attorney Harrison had been extremely careful to consult with defendant: "I think that that started even with jury selection . . .He did not even pick a juror without first consulting with the defendant" (Sentence 15-16).

12. **The Sentence and Notice of Appeal**

A. The court sentenced defendant to concurrent prison terms of twenty-five years to life for each murder count (P.L. § 125.25[1, 3]); to a consecutive term of eight and one-third to twenty-five years for the second-degree attempted murder count(P.L. §§ 110.00/ 125.25[1], to a concurrent term of twelve and one-half to

twenty-five years for the first-degree robbery count (P.L. § 160.15[2]), to five to fifteen years for each of the first-degree assault and second-degree weapon possession counts (P.L. § 120.10[]1, P.L. § 265.03), and to two and one-third to seven years for the third-degree weapon possession conviction (P.L. § 265.02[4]), for a total of thirty-three and one-third years to life imprisonment. Because defendant admitted violating the probated sentence to which had been sentenced had received under Kings County Indictment Number 2884/94 pursuant to his prior conviction for Attempted Robbery in the Third Degree (P.L. §§ 110.00/125/25[1]), he was also sentenced to a consecutive prison term of one and one-third to four years, resulting in a total sentence of thirty-four and two-third years to life imprisonment.

B. On April 17, 1995, defendant filed a notice of appeal to the Appellate Division, Second Department.

13. **The 1997 Pre-Appeal Motion to Vacate the Judgment of Conviction**

A. Pending the perfection of the direct appeal by assigned counsel, defendant on February 15, 1997, filed a pro se motion to vacate the judgment, pursuant to C.P.L. § 440.10, claiming that (i) he was denied his right to counsel at a pre-accusatory investigative lineup; (ii) his trial counsel was ineffective for failing to advance at the Wade hearing the claim that defendant was denied the right to counsel at the lineup; (iii) his trial counsel was ineffective because he introduced into evidence a photo array depicting defendant wearing a police identification tag; and (vi) the People had failed to turn over DD-5 reports referencing the statements of witnesses

B. The People opposed the motion, establishing that the claims were subject to resolution on direct appeal and without merit.

C. By decision dated June 16, 1997, The Supreme Court, Criminal Term (Lipp, J.), denied the motion to vacate, finding that (i) the record on appeal established that defendant's attorney waived his appearance at defendant's lineup; (ii) trial counsel was not ineffective for failing to pursue a claim that defendant's was denied the right to counsel at the lineup when defendant's former counsel had waived his appearance at that lineup; (iii) trial counsel was not ineffective for utilizing defendant's appearance in the photo array in furtherance of the defense that the subsequent lineup identifications had been tainted, and (iv) the contents of the homicide reports were the duplicative equivalent of the taped statements of witnesses provided to the defense.

D. Defendant's application for leave to appeal was granted by the Appellate Division, which ordered that appeal consolidated with defendant's direct appeal from the judgment.

14. **The 1997 Consolidated Direct Appeal and Appeal From the June 16, 1997 Order Denying Defendant's 1996 Motion to Vacate the Judgment**.

A. On his direct appeal to the Appellate Division, defendant's assigned appellate counsel, William L. Ostar, claimed: (i) defendant was denied the right to counsel at the investigatory lineup and the court improperly limited cross-examination of the People's witnesses concerning this issue; (ii) the prosecutor belittled defendant's decision to testify after the defense had already rested; (iii) the evidence of defendant's identity as the gunman was legally insufficient because

the descriptions by eyewitnesses varied and the pretrial identifications of defendant were tainted; (iii) the hearing court should have suppressed the lineup identifications based upon the suggestiveness of the clothing that defendant wore; and (v) the sentence was excessive.

B. The People opposed the appeals for the reasons stated in their briefs to the Appellate Division, to which this Court's attention is respectfully directed.

C. On March 27, 1999, the Appellate Division affirmed the judgment of conviction and the order denying the motion to vacate the judgment, finding defendant's claims to be without merit. People v. Collins, 259 A.D.2d 758 (2d Dep't 1999).

D. The Appellate Division then denied defendant's motion to reargue the appeal, and, on August 17, 1999, the Court of Appeals denied defendant's application for leave to appeal to that court. People v. Collins, 95 N.Y.2d 1016 (1999).

15. **Defendant's Judgment of Conviction Became Final on November 15, 1999, Upon Defendant's Failure to Seek a Writ of Certiorari From the United States Supreme Court**.

16. **Defendant's Efforts to Obtain Records Pursuant to Freedom of Information Law and Related Litigation**

A. In 13 years since his conviction, defendant has made numerous requests, supplemental requests, amended requests, etc., to the Kings County District Attorney's Office and other agencies pursuant to the Freedom of Information Law ("F.O.I.L."), including financial records related to the homicide investigation for the years 1994 and 1995, records and files pertaining to the witnesses who testified at his trial, and names and salaries of all employees of the Kings County District Attorney's Office. Defendant has also appealed from virtually every

response to such requests, which has resulted in three C.P.L.R. article 78 proceedings.

B. In one such petition, defendant sought the parole records of trial witness Edwin Oliva. The petition was denied. Matter of Collins v. Division of Parole, 251 A.D.2d 738, 674 N.Y.S.2d 145 (3d Dept 1998). One such petition, which was referred to this Court by the Clerk of Court, was denied by decision and order, dated July 3, 2007. Defendant's pro se petition was denied as it was filed in conjunction with the instant CPL 440.10 motion for discovery of the very same material sought in his C.P.L.R article 78 petition.

C. Defendant is in the midst of federal litigation with the New York Department of Probation (hereinafter "Probation") as to matters that appear to be related to previous FOIL requests.

17. **Defendant's 2006 Motions to Disqualify the Kings County Judiciary and the District Attorney of Kings County From the Motion to Vacate the Judgment of Conviction**

A. On March 17, 2006, Deputy Chief Administrative Judge for New York City Courts Joan B. Carey denied a motion filed by Joel B. Rudin [Attorney Rudin], on behalf of defendant Collins seeking (i) to disqualify District Attorney Charles J. Hynes from representing the People in opposing a motion to vacate the judgment on the ground that DA Hynes and his staff would engage in gross prosecutorial misconduct in order to conceal what Attorney Rudin characterized as the gross prosecutorial misconduct that he alleged had been committed during defendant Collins's prosecution for the murder of Rabbi Pollack; (ii) the appointment of a special district attorney, and (iii) a "change of venue," by which Attorney Rudin

meant the disqualification of every Supreme Court Justice sitting in Kings County from presiding over the consideration of said motion to vacate and the assignment of said matter to a Justice of the Supreme Court sitting in New York County, on the ground that all Justice sitting in Kings County would conspire with DA Hynes in defeating defendant's motion out of fear that DA Hynes would engage in retaliatory conduct directed at said Justices.

B. When defendant then filed said motion to vacate the judgment of conviction (see below), Attorney Rudin moved again, on April 27, 2006, to disqualify the assigned judge, the Honorable Robert K. Holdman, as well as DA Hynes. Attorney Rudin also augmented the original motion by seeking to disqualify the undersigned from representing the Office of the District Attorney in the matter of the motion to vacate on the ground that the undersigned had been assigned to investigations and cases supervised by ADA Vecchione and would, according to Attorney Rudin, engage in gross misconduct in order to defendant ADA Vecchione against Attorney Rudin's claims.

C. The People opposed the motions in a submission to which this Court's attention is respectfully directed.

D. Justice Holdman denied the motions.

18. **Defendant's 2006 Motion "For Permission to Renew" the 1997 Motion to Vacate the Judgment of Conviction: Please refer to APPENDIX I at ¶¶ 14-16, 27; APPENDIX III at ¶¶ 30.E, which are incorporated herein by reference.**

A. On or about March 15, 2006, defendant, acting through retained counsel Joel B. Rudin [Attorney Rudin], filed a motion in the Supreme Court, Kings County, to

"renew defendant's February 15, 1997 motion to vacate the judgment, which was denied by decision dated June 16, 1997.

B. Counsel sought to renew the motion – which had included a claim that the People had withheld exculpatory evidence (Brady) consisting of a police report – by including for the first time the claim (i) that the People also failed to disclose exculpatory (Brady) material when the prosecutor allegedly failed to turn over a copy of the 911 tape and further failed to disclose that the contents of said tape was allegedly inconsistent with the testimony of witness. Counsel further sought to renew the motion – which had included a claim of ineffective assistance of counsel for failing to investigate – by raising the matter of the People's failure to disclose exculpatory evidence of third-party culpability, i.e. leads investigated by the police that members of the Ashby family were involved in the homicide of Rabbi Pollack

C. According to counsel, defendant could not have included these claims in his 1997 pro se motion[11] because defendant had been (i) unaware that his trial counsel had never received the 911 tape, and (ii) unaware of the contents of DD-5 reports – which defendant conceded were produced by the People – documenting the investigation into leads about possible involvement of members of the Ashby family.

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[11] Although the 1997 motion was filed by defendant, acting pro se, he was represented at that time by assigned appellate counsel.

D. Attorney Rudin maintained that this "renewal' of a previously denied motion, which defendant had appealed unsuccessfully, was authorized pursuant to New York Civil Procedure Law section 2221, which he maintained controlled because Article 440 of the Criminal Procedure Law did not provide to the contrary.

E. Respondent opposed the motion on the ground that a movant cannot circumvent the provisions sections C.P.L. § 440.10(3)(c) – which strictly limit a defendant's right to file more than one motion to vacate – simply by "renewing" a previously denied motion.[12] C.P.L. § 440.10(3)(c) provides that a motion to vacate may be denied summarily if, "[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." Because C.P.L. § 440.10(3) expressly provided the test to be applied to determine whether a court may, in its discretion, relieve a defendant from forfeiture of claims if the movant demonstrated good cause for having failed to raise said claims on a prior motion to vacate, analogical application of the C.P.L.R. would be inappropriate. See Preiser, P., Practice Commentaries, McKinneys Cons. Laws of N.Y., C.P.L. § 440.10., pp. 427 ("Under paragraph (c) [of C.P.L. § 440.10(3)] . . . This provision is consistent with other C.P.L. § provisions aimed at discouraging motion proliferation and dilatory tactics").

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[12] The People's opposition to this motion to renew was included, at the direction of the motion court, in their initial submission [APPENDIX I] in opposition to defendant's ensuing motion to vacate the judgment.

F. The People further argued that, because defendant had failed to establish through sworn allegations of fact the existence of newly discovered evidence in that it was not available to defendant at the time he filed his 1997 motion to vacate and his direct appeal from the judgment, the motion court should deny the motion insofar as it was based on the claim of newly discovered evidence, pursuant to C.P.L. § 440.10(3), and pursuant to C.P.L. § 440.30(1), (4)(b)(d), which requires a movant to substantiate, through sworn allegations, all factual allegations necessary to support the stated ground.

G. Indeed, the March 15, 2006 motion did not contain either an affidavit by defendant or an affirmation by his trial counsel, Attorney Harrison, attesting under penalty of perjury to the facts alleged by Attorney Rudin, namely that the People withheld the 911 tape and evidence of third-party culpability and that Attorney Harrison did not pursue either omission.[13]

H. In contrast, the People established that the People had not withheld the evidence and that it was no, in any event, Brady material [See APPENDIX I at ¶¶ 14-16, 27; APPENDIX III at 30.E].

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[13] As detailed in the People's Initial Response [APPENDIX I at ¶¶ 14-16, 27], Attorney Harrison informed the undersigned that he would testify for the People in opposing the defense motion insofar as it accused him of ineffective assistance if he were subpoenaed to testify at an evidentiary hearing, at which time he would be relieved from the constraints of attorney-client privilege. To the extent that the defense contended that Attorney Harrison could have corroborated critical factual represention contained in Attorney Rudin's papers, defendant Collins could have relieved Attorney Harrison from the constraints of the privilege and secured from him an affirmation. Defendant Collins did not do so, and he submitted nothing from Attorney Harrison in any supplemental filing.

I. The disclosure of the existence of the 911 recording was reflected in the discovery materials provided by ADA Vecchione to Attorney Harrison on May 10, 1994, more than one year before the start of the trial. If Attorney Harrison had not obtained a copy of the tape to use when cross-examining witness Angel Santos – who testified on direct examination that he was in the process of calling 911 from a telephone in the furniture store when he saw defendant run past the store front windows – then the claim of failure to disclose Brady material could readily have been included in the motion to set aside the verdict, on direct appeal, and/or in the 1997 motion to vacate.

J. Likewise, the court file further reflected that ADA Vecchione also served on Attorney Harrison on May 10, 1994, 71 DD-5 Complaint Follow-Up Reports that comprised the complete record of the police investigation of the robbery-homicide of Rabbi Pollack. Those reports included the record of information relating to possible third-party culpability on the part of members of the Ashby family and the steps undertaken by the police to investigate those leads. Thus, the defendant was on notice of the existence of this evidence, and he could have included in his motion to set aside the verdict, his 1997 motion to vacate the judgment, and/or his direct appeal the claim that the People had failed to make full or adequate disclosure of Brady material relating to possible third-party culpability.

K. The motion court agreed with Respondent, and it denied defendant's motion to renew the 1997 motion [APPENDIX IX at pp. 7-8, 12-15].

L. The Court further found that the claims were procedurally barred, pursuant to C.P.L. § 440.10(3)(c), because defendant had failed to establish that he "was not

in a position to adequately raise" any of the proffered "new" claims when bringing his 1997 motion to vacate the judgment.

M. The motion court also agreed with the People that defendant's unsupported allegations concerning the People's production of records and information pertaining to the Brady material – absent the supporting affirmation by his trial counsel – were inadequate to sustain his allegations. Moreover, the court concluded, the claims were, in any event, belied by the record that established that the People had not failed to comply with their duty to make timely disclosure of exculpatory evidence.

N. Finally, the motion court concluded, to the arguable extent that the People may not have provided the defense with an actual copy of the 911 tape, there was no reasonable possibility that this failure would have contributed to the verdict [APPENDIX IX at pp. 13).

O. As detailed by the People in their Initial Response [APPENDIX I at ¶¶ 14-16, 27 & Memo. of Law], Mr. Santos never stated or testified that he had made contact with a 911 operator. Instead, he testified that he saw defendant flee the murder scene as he was calling the 911 operator. He never stated or testified that he communicated with the operator (Trial 411, 416, 422, 426-27, 521). Therefore, even assuming, as defendant claimed in his 2006 motion, that no call by Mr. Santos was reflected in the 911 recording, that would not have been inconsistent with the testimony of Mr. Santos and thus would not have rendered all or any part of his testimony incredible. Moreover, Mr. Santos was merely one witness to defendant's flight from the crime scene in the moments following the sounds of

gunfire and another witness placed him at the crime scene moments before the shooting began. Therefore, even if the jury had discredited his testimony, there remained legally sufficient evidence of defendant's identity.

P. Finally, the motion court considered and rejected defendant's claim that Attorney Harrison was ineffective because he did not pursue a third-party culpability trial defense [APPENDIX IX at pp. 7-8, 12-15]. As established by the People, Attorney Harrison secured the services of a court-paid investigator who went repeatedly to the crime scene and located and interviewed possible sources of information. Because the defense was in possession of the DD-5 reports for a full year before the trial, and because there was no evidence to the contrary, it must be assumed (i) that these investigatory endeavors encompassed the allegations concerning members of the Ashby family, and (ii) that the results contributed to Attorney Harrison's decision not to pursue a defense based upon a of the murder.[14]

Q. Because the evidence established that a member of the Ashby family visited defendant in jail less than two months before the trial, it must further be concluded that defendant played a part in finalizing that strategy.

19. **The 2006 Motion to Vacate the Judgment of Conviction**:

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[14] That inference is bolstered by Attorney Harrison's statements to the undersigned that, should he be freed from the constraints of the attorney-client privilege, he would address this claim by disclosing information revealed to his investigator by defendant and defendant's family before trial [APPENDIX I at ¶¶ 14-16, 27; APPENDIX III at 30.E].

A. On or about March 15, 2006, defendant, represented by retained counsel Joel Rudin, filed a second motion in New York Supreme Court, Kings County, pursuant to C.P.L. § 440.10(1)(b), (c), (f) and (h) to vacate his judgment of conviction. In furtherance of said motion, defendant advanced, inter alia, claims of prosecutorial misconduct relating to the testimony of three prosecution witnesses: Adrian Diaz, Edwin Oliva, and Angel Santos. Defendant also claimed that trial Attorney Harrison was ineffective because he failed to pursue a defense strategy grounded upon the theory that two other individuals named Ashby actually committed the crimes.

B. Subsequent to filing the original motion [Defendant's Original Motion], counsel for defendant filed additional affirmations and memoranda of law on November 29, 2006, December 1, 2006, and February 2, 2007, which (i) replied to the People's responses to his initial and second set of filed papers and which (ii) augmented defendant's initial motion papers through the submission of additional evidence, and (iii) raised an additional claim regarding witness Angel Santos. Defendant did not seek permission to raise additional claims of error; indeed, defendant did not acknowledge having done so.

C. The People responded, opposing the claims raised in the additional and supplemental submissions by written affirmation and memorandum of law dated November 3, 2006, and in two sets of supplemental responses (filed with the prior permission of the court) dated November 9, 2006, and January 5, 2006. See APPENDIX I, APPENDIX II, and APPENDIX III.

D. Contrary to the persistent contentions of Attorney Rudin – which he repeats in the petition for Habeas Corpus now under consideration – *the People did not concede or fail to oppose and refute any claim, factual misrepresentations, or allegation advanced by Attorney Rudin in any submission to the motion court*. Indeed, the People are at a loss to understand why Attorney Rudin persists in misrepresenting the People's position in such a manner, even after the motion court expressly found that the People

20. **With Regard To Witness Adrian Diaz: The Audiotaped "Interview": Please Refer to the discussion and argument contained in APPENDIX I at ¶¶ 18, 22; APPENDIX II at ¶¶ 17-30; APPENDIX III at ¶¶ 30, 35.**

A. In his original motion, Attorney Rudin submitted an audiotape of what Attorney Rudin represented as a telephone "interview" on September 23, *2003*, between the incarcerated defendant Collins – using an assumed name and falsely claiming to be an investigator on the staff of the Kings County District Attorney – and trial witness Adrian Diaz. However, in Attorney Rudin's original motion this was not substantiated by any proof as to any aspect of this tape, including when it was allegedly made, and the identity of the persons whose voices could be heard on the tape. Significantly missing from the initial defense motion was (i) an affidavit by defendant Collins admitting that he had, while incarcerated in a New York State Correctional Facility, criminally impersonated a law enforcement officer, (ii) an affidavit by Adrian Diaz stating that his was the second voice on the tape; and (iii) an offer of proof that the tape had not been cut, modified, or otherwise adulterated.

B. The People moved for summary denial pursuant to C.P.L. § 440.10(3) on the ground that the tape – assuming its authenticity – was not newly discovered evidence because defendant had delayed for 2-1/2 years after allegedly acquiring this "evidence" before bringing the motion in March 2006. In view of the fact that (i) defendant offered no explanation for the delay, and (ii) did not submit a sworn affidavit attesting to his role in the making of it, it could only be concluded that the delay was implemented in order to allow the two-year limitation period (C.P.L. § 30.10[2][c]) to expire for the crime of Criminal Impersonation in the Second Degree (P.L. § 190.25[3][a] and [b]), which is a Class A Misdemeanor.

C. The People also moved for summary denial of the motion based upon this claim pursuant to C.P.L. § 440.30(1), which specifies that, where factual allegations are needed to support the ground alleged – i.e., the sworn statement of a witness to the making of the recording – the essential facts must be alleged under oath.

D. The People also argued that, pursuant to C.P.L. § 440.30(4)(d)(i), the motion court could deny the motion without a hearing even were defendant to supplement the motion by submitting an affidavit adopting the "facts" stated by Attorney Rudin regarding the tape. Such a self-serving affidavit, standing alone, would be insufficient to arguably warrant a hearing, absent the submission of an affidavit by Adrian Diaz adopting the contents of the tape under the penalty of perjury.

E. This was so, the People urged, because the duplicitous and arguably illegal manner by which Attorney Rudin represented that defendant had made the taped recording, while in the custody of the New York State Department of Corrections, of a witness who had feared for his life when he testified at defendant's trial

established that defendant Collins was willing to do and say anything to advance the motion.

F. This was confirmed by evidence laid out by the People in their Third Response establishing that defendant, acting alone or in concert with others, had committed the crimes of Forgery and Offering a False Instrument for Filing as he perpetrated a fraud upon a court as the means by which defendant obtained the factual information about Mr. Diaz that he then utilized during the illicit telephone "interview" in order to effectively impersonate a member of the staff of the Kings County District Attorney's Office.

i. Mr. Diaz had been sentenced, as a Youthful Offender, on December 15, 1993, to a three-year probated sentence upon his guilty plea to the misdemeanor count of criminal sale of a controlled substance in the seventh degree, as charged under Supreme Court Information Number 12753/93. The Supreme Court file in that matter contained a seemingly pro se motion dated August 2, 2002, purportedly signed by "Adrian Diaz," seeking a copy of his Presentence Report for purpose of petitioning for a pardon from the governor.

ii. The notice of motion, the supporting affidavit, and the affidavit of service misspell Mr. Diaz's first name as "Adrain," and the signature does not match other examples of Mr. Diaz's signature on record with this and other agencies.

iii. The notice of motion and affidavit of service specify that Mr. Diaz's address was "111 Humboldt Street, Apartment 6J, Brooklyn." There was and is no record that Mr. Diaz ever resided at that address. Moreover, the transcript of the alleged telephone conversation between defendant Collins (posing as an

employee of this Office) and someone alleged to be Mr. Diaz, represents that Mr. Diaz resided in Massachusetts in 2003. However, and as acknowledged in paragraph 142 at page 55 of counsel's affirmation in furtherance of the original motion to vacate, *defendant Collins resided with his family at 111 Humboldt Street, Apartment 6J, at the time of his arrest for the 1994 murder of Rabbi Abraham Pollock.* Moreover, inmate visitation records obtained by the People establish that members of defendant's immediate family who have regularly visited defendant since 1994 specify that his immediate family lived and continued to live at that address.

iv. The supposedly pro se motion by "Adrain" Diaz was granted by decision dated October 28, 2002 (Knipel, J.), and the decision and report were mailed by the Clerk of the Supreme Court to defendant's apartment at 111 Humboldt Street.

v. Information contained in Mr. Diaz's probation report – including Mr. Diaz's date and place of birth, social security number, the name of the mother of his child, and the name of his brother – was reflected in what the defense represents to be the audiotape of the September 23, 2003, "interview" of Mr. Diaz by defendant Collins, who claims through his attorney that he falsely represented himself to Mr. Diaz as an employee of this Office.

vi. The statute of limitations for the prosecution of these crimes had run by the time that defendant filed his 2006 motion to vacate in which he advanced as evidence of prosecution misconduct the taped "interview" with Mr. Diaz.

G. On December 1, 2006 – almost nine months after filing the motion to vacate – Attorney Rudin included in a his second submission, an affidavit in the name of

defendant Collins, in which the affiant admitted to having criminally impersonated a law enforcement officer in order to trick someone whom he alleged was Adrian Diaz. However, the affiant did not acknowledge or explain why he had delayed in bringing the motion to vacate until after the statute of limitations had run. The affiant did not acknowledge or deny that he had committed the crimes of Forgery and Offering a False Instrument for Filing in perpetrating a fraud upon a court in order to obtain information about Mr. Diaz in order to portray an employee of the Office of the District Attorney, and the affiant did not acknowledge or explain why he delayed in bringing the motion to vacate until after the statute of limitations had run for those crimes.[15] Defendant also did not explain how he had acquired information about Mr. Diaz that he used during the "interview" to convince and intimidate Mr. Diaz to cooperate.

H. Defendant simultaneously submitted an affidavit that was allegedly executed by Mr. Diaz at the behest of an investigator hired by defendant.[16] This affidavit, assuming that it was executed by Mr. Diaz, was noteworthy for what it did not include: (a) an acknowledgement that Mr. Diaz has been informed that defendant had tricked him into discussing the facts of the crime by impersonating a law

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[15] Attorney Rudin did not acknowledge, contest, or distance himself from the evidence of his client's fraudulent/criminal activities in any submission to the motion court. The motion court would ultimately find that defendant did, in fact, engage in these criminal activities, although it expressely found that "these matters of fraud by defendant are no, in any manner, attributed to" Attorney Rudin [APPENDIX IX at p. 15, n. 15].

enforcement officer; (b) an acknowledgement that Mr. Diaz has been informed that defendant Collins had forged and falsified a motion in Mr. Diaz's name that allowed defendant to acquire from the courts personal and privileged information about Mr. Diaz and Mr. Diaz's family and to locate and contact Mr. Diaz.

I. Finally, Mr. Diaz's alleged affidavit was noteworthy for the fact that *it did not contain a recantation of his trial testimony identifying defendant*.

21. **With Regard to Witness Adrian Diaz: The Claim that the People Coerced Him to Testifying and Withheld from Defense the Existence of a Cooperation Agreement: Please refer to discussion and argument contained in APPENDIX I at ¶¶ 18, 22; APPENDIX II at ¶¶ 17-30; APPENDIX III at ¶¶ 30, 35, which are incorporated herein by reference.**

A. Defendant claimed that the People had threatened Mr. Diaz with, inter alia, prosecution for the murder of Rabbi Pollack if he did not testify against defendant and had then entered into a secret and coercive agreement with Mr. Diaz that we did not disclose to the defense. Pursuant to that agreement, according to defendant, ADA Vecchione intervened to protect Mr. Diaz from violation of probation by arranging that Mr. Diaz's period of probation be extended for two years.

B. The People denied the allegations through the affirmations of ADA Vecchione and others who were involved in locating Mr. Diaz in Puerto Rico on the eve of defendant's trial.

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[16] Absent from this submission was an affidavit by this defense investigator attesting to the circumstances under which he had located Mr. Diaz and explaining what he told Mr. Diaz to convince him to sign the affidavit.

C. The People further proved through documentary evidence that Mr. Diaz testified voluntarily; that there was no cooperation agreement; that the People did not intercede on Mr. Diaz's behalf in return for his testimony, and that Mr. Diaz's probation was not extended.

22. **With regard to Witness Edwin Oliva: The Manner Through Which Defendant Obtained Possession of Mr. Oliva's Public Defender Case File: Please refer to discussion and argument contained in APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at 30.A-B, which are incorporated herein by reference**.

A. In his initial motion, defendant contended that that witness Edwin Oliva had received a lenient sentence from the Kings County District Attorney in 1994 in return for his testimony against defendant Collins more than one year later, pursuant to an alleged secret cooperation agreement that the People then failed to disclose at trial.

B. In support of that claim, Attorney Rudin submitted two versions of an affidavit, allegedly by Mr. Oliva, both dated January 20, 2006, one printed and one typed. Only the printed version appeared to be signed in the name of Edwin Oliva, to have been notarized by Attorney Rudin, and to have been "witnessed by Roland R. Acevedo," who was identified in the affidavit as Mr. Oliva's attorney.

C. The People argued that summary denial of the motion was warranted because the motion did not include an affirmation by Attorney Acevedo attesting to the circumstances under which the affidavit was allegedly made by his client. The People argued that the necessity for such an affirmation by Attorney Acevedo was exemplified by statements made by Attorney Acevedo in a telephone conversation with the undersigned on November 1, 2006. Attorney Acevedo stated that he

could not recall who had drafted the printed and signed version of the affidavit, which was the only version on which a signature of "Edwin Oliva" appeared, and he further stated that he could not recall whether the printed version was drafted in Oliva's presence or prior to his and Attorney Rudin's arrival.

D. Furthermore, Attorney Acevedo volunteered that he had worked "dozens of hours" to assist defendant Collins in obtaining his client, Mr. Oliva's 1994 file from the Legal Aid Society, and he laughed upon being informed that LAS's copy of that file no longer existed.[17]

E. Mr. Acevedo reluctantly agreed that Mr. Oliva had waived attorney-client privilege by authorizing him to assist Attorney Rudin on behalf of defendant Collins, and by speaking to Mr. Oliva in the presence of Attorney Rudin, yet he declined to answer further questions concerning his representation of Mr. Oliva. Attorney Acevedo expressly declined to state who had compensated him for his work on defendant Collins' behalf, information that was not protected by the attorney-client privilege.

F. However, Attorney Acevedo acknowledged that he had visited defendant Collins at defendant Collins at his place of incarceration without Attorney Rudin being present, a fact established by the People through inmate visitation records, which disclosed that Attorney Acevedo signed in as a visitor to defendant. Attorney

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[17] Defendant had earlier filed filed suit seekiing Mr. Oliva's LAS file. LAS vigorously opposed the attempts, even after Mr. Oliva – represented by Attorney Acevedo – seemingly joined in defendant's request for the file. Ultimately, after protracted ligitgation, LAS was ordered to produce the file to Mr. Oliva, who was represented by Attorney Acevedo

Acevedo informed the undersigned that he never informed his client, Mr. Oliva, of the meeting with defendant.

G. The People further established, through the records of the New York State Department of Correctional Services, that Attorney Acevedo had not only visited defendant Collins in prison, but that defendant had then mailed $300 to Attorney Acevedo's law office on November 22, 2005, less than two months before Attorney Acevedo notarized the statement by his client in the presence of Attorney Rudin.

H. Attorney Acevedo, in an affirmation subsequently submitted by defendant, protested that he had merely met defendant while at the correctional facility to meet another client. That representation was refuted by the facility's inmate visitor log, which established that Attorney Acevedo signed into the

23. **With Regard to Edwin Oliva, the Claim that the People Withheld from Defendant the Fact of a Cooperation Agreement**: **Please refer to discussion and argument contained in APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at 30.A-B, which are incorporated herein by reference**.

A. Defendant never substantiated through sworn allegations thereof, as required by C.P.L. § 440.30(1), his claim that Edwin Oliva had, in fact, received a lenient sentence from this Office in 1994 in return for his testimony against defendant Collins more than one year later, pursuant to an alleged secret cooperation agreement that the People then failed to disclose at trial. In fact, the January 20, 2006 affidavit of Mr. Oliva – which was obtained and notarized by Attorney Rudin with the assistance of Attorney Acevedo – stated only the following with regard to the 1994 case:

After I pleaded guilty and was sentenced, I was sent Upstate to Ulster Correctional Facility.

B. Furthermore, the defense did not submit the affirmations of the Legal Aid Society attorney(s) who represented Mr. Oliva on the 1994 case – or of anyone else – attesting either to a knowledge or a belief that Mr. Oliva had, in fact, received a favorable sentence offer from this Office for any reason, much less in order to secure his cooperation against defendant Collins. Nevertheless, Attorney Rudin persistently outlined in his own affirmations what *he* represented transpired.

A. In contrast, the People established that Attorney Rudin's analysis and his conclusions were wrong; the disposition of Mr. Oliva's 1994 case was routine and wholly unrelated to his testimony at defendant's trial.

B. For a full discussion of the evidence upon which the motion court based its decision, lease refer to discussion and argument contained in APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at 30.A-B, which are incorporated herein by reference.

C. The People further established that there was no merit to the defense claim that ADA Vecchione lied to the court and to trial counsel, Mr. Harrison, when he detailed that there was no cooperation agreement with Mr. Oliva, and that this Office had promised him only that, following his testimony, (i) a letter would be written to the Division of Parole noting his assistance, and (ii) that this Office would relocate defendant upon his release from custody if Mr. Oliva so requested.

D. Attorney Rudin further claimed that the People failed to disclose to the defense that Mr. Oliva had recanted.

E. The People established that both unsubstantiated claims were untrue: There was no "cooperation agreement," and no other promises had been made to Mr. Oliva. Moreover, although Mr. Oliva was frightened and reluctant to testify against defendant – whom he had known for years before the murder – Mr. Oliva never recanted the substance of his signed statement. Please refer to discussion and argument contained in APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at 30.A-B, which are incorporated herein by reference.

F. The defense relied in support of his allegations to the contrary upon the "Oliva Affidavit," see discussion above, and a scenario pieced together from records obtained by the defense over the years through FOIL requests. However, the scenario outlined was unfounded, and the "Oliva Affidavit," contained patently untrue statements of "fact." Mr. Oliva never recanted; he was not forced to testify, and he was promised nothing other than the People disclosed at trial. The People did not secretly meet with Mr. Oliva in the days leading up to his testimony. The People did not conspire with the Department of Corrections/Division of Parole to terminate Mr. Oliva's work release status as an incentive to compel him to testify. Please refer to discussion and argument contained in APPENDIX I at ¶¶ 19-21; APPENDIX II at ¶¶ 6-16; APPENDIX III at 30.A-B, which are incorporated herein by reference.

24. **By Decision and Order Dated September 7, 2007, The Motion Court Denied Defendant's Motion to Vacate the Judgment of Conviction.**

25. People v. Collins, 2007 NY Slip Op 51687U; 16 Misc. 3d 1133A; 847 N.Y.S.2d 904; 2007 N.Y. Misc. LEXIS 6162 (S. Ct. Kings Co. 2007), is set for the in full at APPENDIX IX.

26. Respondent expressly adopts the recitation of the procedural history and evidence introduced at the trial, as well as the findings of fact and the legal conclusions of the hearing court in resolving defendant's various claims. Respondent will not undertake to summarize the lengthy decision in detail in this Affidavit; however, Respondent takes special notice of the following findings and conclusions of the hearing court, which may be found at the indicated pages of the appended decision.

27. With regard to defendant's motion to renew his 1997 motion to vacate to incorporate the claim of error involving the 911 tape, the motion court first rejected the motion to renew as unfounded vacate because there was no statutory authority for granting such relief. Next, the court went on to find that the substantive claim, as included in defendant's March 2006 motion to vacate, was procedurally barred pursuant to C.P.L. § 440.10(3)(c), because defendant had not established that he was not in a position to include the Brady claim in his first motion to vacate. Third, the court concluded the claim was further barred procedurally pursuant to C.P.L. § 440.30(4)(b), (d), because defendant did not substantiate the factual allegations on which it hinged, specifically an affirmation by trial counsel with regard to whether he knew of, requested,

or obtained the tape.[18] Finally, having previously summarized the overwhelming evidence of defendant's identity as the perpetrator, the court found that defendant had, in any event, failed to establish that "a reasonable possibility [exists] that failure to disclose the Rosario material contributed to the verdict." [APPENDIX IX at pp. 7, 9-10, 11-12, 13].[19]

28. With regard to defendant's claims of prosecutorial misconduct involving witnesses Adrian Diaz and Edwin Oliva, the court found that defendant's claims or prosecutorial misconduct were "wholly without merit, conclusory, incredible, unsubstantiated, and, in significant part, to be **predicated upon a foundation of fraud through defendant's own admissions and upon overwhelming documentary evidence**." [APPENDIX IX at pp. 13]. The motion court **could not "ignore evidence of [fraud] and/or questionable conduct when considering the reliability of the purported affidavits of both Edwin Oliva and Adrian Diaz**." [APPENDIX IX at pp. 15] As a result, and in light of other evidence considered by the

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[18] The court declined to attribute the procedural default under C.P.L. § 440.30 to the failure of defendant to procure an affirmation from trial counsel supporting his contention that the tape was not produced in view of the on-record evidence that clearly would have belied such a claim: "Even if trial counsel submitted an affidavit, it would not necessarily be sufficient to require a hearing. See, People v. Bacchi, 186 A.D.2d 663 (2d Dep't 1992) (citing, People v. Brown, 56 N.Y.2d 242 [1982]) (defense counsel's conclusory allegation that he "verily believed" that the People failed to gurn over a police report was insufficient to raise a triable issue of fact").

[19] The court found found that Mr. Santos did not testify that he spoke to the 911 operator: "The disclosure of the existence of the 911 recording is clearly reflected in the discovery and *Rosario* materials provided to trial counsel upwards of one-year prior to trial. Further, Angel Santos *tesified that he was in the process of dialing 911* as he observed defendant flee the crime scene. Had defendant not been supplied with a copy of the 911 recording, he certainly could have raised tht issue in his previous C.P.L. § 440.10 motion." [APPENDIX IX at pp. 12].

court, it concluded that the "purported affidavits of Oliva and Diaz, their "recantations"[20] and other alleged "new evidence" cited therein, are conclusory, incredible and otherwise unreliable, and defendant's motion is denied without a hearing" [APPENDIX IX at pp. 16, 17].

29. With regard to witness Adrian Diaz, the motion court found "overwhelming evidence" [APPENDIX IX at pp. 13-15] that defendant had "engaged in fraud upon alleged witnesses and the Court by, (i) posing as an detective investigator of the District Attorney's Office and (ii) by having filed a fraudulent motion by posing as Adrian Diaz and seeking an order for the pre-sentence report of Adrian Diaz. The court held that "even if the second individual who was part of the recorded telephone conversation made by defendant is actually Diaz, its recording was made under criminal and otherwise fraudulent circumstances, as defendant admits, thereby rendering it unreliable." [APPENDIX IX at pp. 17]. The court went on to find "the purported affidavit of Diaz to be completely incredible and unreliable, [] conclusory, unsubstantiated and belied by the record and documentary evidence submitted. C.P.L. § 440.30(4)(b),(c), (d). Similarly unsubstantiated is defendant's conclusory allegation that Diaz tested positive for marihuana." [APPENDIX IX at pp. 17]. The found defendant's contention that defendant's claim that the People secretly arranged favorable probation-violation treatment for Mr. Diaz both unsupported and belied by the evidence, including that submitted by the defense [APPENDIX IX at pp. 17-18].

30. With regard to witness Edwin Oliva, the court found disturbing evidence that it could not ignore [APPENDIX IX at pp. 13, 15] that defendant had "engaged in fraud upon

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[20] The court correctly found that the purported Diaz affidavit did not contain a recantation [APPENDIX IX at pp. 18].

alleged witnesses and the Court by virtue of his relationship with Attorney Roland Acevedo, who was paid by defendant to "ostensibly" represent Mr. Oliva in order to accomplish what defendant had attempted unsuccessfully in the past to accomplish, namely, to compel the Legal Aid Society to disclose to him Mr. Oliva's criminal defense file for use in attempting to establish that Mr. Oliva had committed the crime of perjury when he testified at defendant's trial. Furthermore, all of the evidence reviewed by the court revealed nothing inconsistent with ADA Vecchione's representations at trial that Mr. Oliva "merely received the promised letter to Parole," and that there was no concealed cooperation agreement [APPENDIX IX at pp. 16-17]. The court found that the "purported affidavit of Oliva and recantation of Oliva to be completely unreliable, incredible and unsubstantiated." [APPENDIX IX at pp. 17]. The court concluded:

> The written submissions of the People and defendant, including Oliva's purported affidavit, coupled with the trial record and other documentary evidence reviewed by the Court, provide a sufficient basis from which this Court could decide the motion without a hearing. People v. Cassels, 260 A.D.2d 392, 393, 697 N.Y.S.2d 681 (2d Dep't 1999), lv. denied, 93 N.Y.2d 1043, 720 N.E.2d 95, 697 N.Y.S.2d 875 (1999).

31. With regard to the added claim that the People secretly agreed to accord Angel Santos a favorable disposition of a summons in return for his cooperation, the court denied the motion because this ground was procedurally barred [APPENDIX IX at pp. 18]. By virtue of the eight month lapse between the filing of the initial motion in March 2006, and defendant's unremarked inclusion of this new claim within a reply motion in November 2006, the court deemed it a new motion to vacate subject to dismissal pursuant to C.P.L. § 440.10(3)(b), where defendant did not then or ever proffer an explanation for omitting this claim from the initial filing and for failing to request permission to amend his motion. The court nevertheless went on to address the evidence produced by the defense and by the People and concluded that "there is

no evidence nor indication that the People had any knowledge, imputed or otherwise, of the summons or its adjudication." Moreover, defendant failed to offer any proof that the People did not disclose this charge and its disposition to defendant at trial, and the court found that the actual disposition was not unusual or out of line [APPENDIX IX at pp. 19].

32. With regard to each and every of defendant's Brady claims, the court found that, even if substantiated, they were without merit because "[d]efendant failed to establish that the People were even in possession of any such Brady material at the time or trial or that it was exculpatory in nature . . . . Assuming, arguendo, that certain undisclosed Brady material existed, due to the overwhelming evidence of defendant's guilt, there is no reasonable possibility that the failure to disclose this evidence would have contributed to the verdict." [APPENDIX IX at pp. 19-20, citing, inter alia, United States v. Bagley, 473 U.S. 667, 675-76 (1985); United States v. Gil, 297 F.3D 93, 101 (2d Cir. 2002); United States v. Madori, 419 F.3d 159, 222-23 (2d Cir. 2005)].[21]

33. **Defendant's Application For Leave To Appeal From The Denial Of The Motion To Vacate** was denied by decision and order (unreported) of the Appellate Division, Second Department, dated March 3, 2008. Respondent acknowledges that defendant included in that application the grounds of error upon which he bases the instant petition.

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[21] With regard to other claims, the court found that the defense was on notice of the third-party culpability evidence because it was disclosed to trial counsel one year before the trial. The court also rejected the claim that trial counsel was ineffective for not investigating and pursuing a third-party defense at trial. The court noted that the People had proved that one of the alleged third-parties had visited defendant in jail two months before the start of the trial, that defendant had played an active role in the direction of the activities of his court-appointed investigator and the formulation of trial strategy, that defendant had not named any alleged third-party suspects when he testified, and that defendant had been closely involved in the decision to call no other witnesses for the defense. [APPENDIX IX at pp. 12-13].

34. **Defendant's Petition for a Writ of Habeas Corpus.** Defendant seeks a writ of habeas corpus on the ground that "Defendant's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the Constitution, were violated when the People knowingly presented false and misleading evidence and argument, and withheld Brady material." Defendant further claims that he was denied due process by virtue of the State court's summary denial of the motion without first conducting an evidentiary hearing.

35. The petition is untimely for all the reasons set forth in the accompanying Memorandum of Law.

36. The petition is without merit and should be denied for all the reasons set forth in the accompanying memorandum of law.

37. The demand for an evidentiary hearing is meritless for all the reasons set forth in the accompanying memorandum of law.

WHEREFORE, for the reasons stated in the accompanying Memorandum of Law, defendant's petition for a writ of habeas corpus should be dismissed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: Brooklyn, New York
August 28, 2008

Monique Ferrell
Assistant District Attorney

Office of the Kings County District Attorney
350 Jay Street
Brooklyn, New York 11201
(718) 250-249

APPENDIX I:

[INITIAL] RESPONSE IN OPPOSITION TO MOTION TO VACATE [AS SEPARATELY SUBMITTED TO THE COURT AS PART OF COURTESY COPY]

APPENDIX II:

[FIRST] SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION TO VACATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 34

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- JABBAR COLLINS, Defendant.	SUPPLEMENTAL AFFIRMATION IN OPPOSITION TO MOTION TO VACATE JUDGMENT AND RELATED MOTIONS Kings County Indictment Number 2884/94

MONIQUE FERRELL, an attorney admitted to practice in the State of New York and an Assistant District Attorney in the County of Kings, affirms the following to be true under the penalties of perjury:

38. In compliance with this Court's order, on November 3, 2006, I filed an affirmation and memorandum of law on behalf of Respondent in opposition to defendant's motion, dated March 15, 2006, pursuant to C.P.L. § 440.10, to vacate his judgment of conviction, and for other related relief.

39. On November 3, 2006, this Court issued an order directing Respondent to undertake certain actions relating to the production of documents relevant to the instant motion and extending the time for the filing of the People's response from November 3 to November 9, 2006. However, I did not receive the Court's order until after I had already filed the People's response in compliance with this Court's earlier order.

40. Accordingly, I respectfully ask this Court to accept this supplemental affirmation. As I noted in my November 3 Affirmation, counsel for defendant Collins does not object to such a supplemental submission.

41. The following statements are made upon information and belief, based upon the files and records of the Kings County District Attorney's Office, which now include documents received in response to subpoenas to the New York City and Kings County Department of Probation relating to Adrian Diaz, to the New York City Department of Probation and New York State Division of Parole pertaining to Edwin Oliva, and to the New York State Department of Corrections pertaining to defendant and Edwin Oliva. Although Respondent included in said subpoenas a request that the entirety of these agencies' files pertaining to the specified individuals be delivered to this Court, Respondent cannot attest to the completeness of the records that were produced by the subpoenaed agencies and that Respondent has obtained from the clerk of the Court.

42. Pursuant to this Court's November 3, 2006 order, Respondent is undertaking the redaction of said agency records in conformance with the particularized directive of this Court. That process has not yet been completed at the time of the filing of this affirmation. Upon completion, Respondent will promptly coordinate with counsel for defendant Collins to make those redacted records available to him in the manner that he chooses. In further conformance with this Court's order, Respondent will retain the original, unredacted copies of the records produced by the subpoenaed agencies.

43. Appended hereto is the affidavit of Thomas McDonald, Records Management Officer for the Office of the Kings County District Attorney. Mr.

McDonald states therein that he directed the unsuccessful search for the visitor's logs maintained by this agency in 1994-1995. It is not possible, therefore, through the use of those records to refute or confirm defendant's claim that Edwin Oliva was brought repeatedly to this Office in the days leading up to his testimony at defendant's trial on March 7, 1996. However, as detailed in Respondent's November 3, 2006 affirmation, Mr. Oliva was brought from Ulster Correctional Facility to the Brooklyn House of Detention and then to this Office by means of appropriate court orders on March 6, 1995. There is no reference or record to his having been at this Office on any prior occasion. Indeed, Mr. Oliva was incarcerated at Ulster Correctional Facility during the days leading up to his testimony, and he was not transported from Ulster Correctional Facility to Brooklyn until the afternoon of March 6, 1995.

44. Appended hereto is the affidavit of Lieutenant Salvatore Munafo, New York State Corrections Officer assigned to Lincoln Correctional Facility at 31-33 West 110th Street in Manhattan. As detailed in Lieutenant Munafo's affidavit, he has been unable to locate the records of Lincoln Correctional Facility that would have documented visitors to that facility during the period of February-March 1995, and he further attests to his informed belief that those logs no longer exist. Accordingly, it is not possible to refute or confirm through reference to those facility records the allegation contained in the defense motion that ADA Charles Posner visited Edwin Oliva at that facility sometime during the indicated time period. However, the existing records of this Office contain no reference to or record of such a visit.

45. Appended hereto is the affidavit of Captain Timothy Miller, New York State Corrections Officer at the Ulster Correctional Facility in Naponich, New York. As explained therein, Captain Miller attempted to locate the facility logs for the period from March 3 through March 7, 1995. Captain Miller details that he has learned that the log books which would have documented visitors to the facility no longer exist, having been destroyed pursuant to directives of the New York State Department of Correctional Services, which require the logs to be maintained for only five years. Accordingly, it is not possible through reference to those records to refute or corroborate the allegation contained in the "Oliva Affidavit" that Mr. Edwin Oliva was brought repeatedly to this Office during the period from March 3, though March 7, 1995, while he was incarcerated at Ulster Correctional Facility. However, the existing records of this Office establish that Mr. Oliva was produced by appropriate court order on March 6, 1996, on which date he was prepared for the first time for his testimony on March 7, 1996.

46. Captain J. Beck-Harrell, New York City Corrections Officer, Legal Division, New York City Department of Corrections, has informed ADA Marie-Claude Wrenn that the facility logbooks for the Brooklyn House of Detention Correctional Facility for March 6-7, 1995 are not included in a computerized inventory of the records of that facility, which is currently closed. Captain Beck-Harrell has ordered a physical search of the storage facilities within the Brooklyn House of Detention, and she will submit any records that are found to this Court. If Captain Beck-Harrell locates these records, they will be produced to this Court for examination. If she determines that the

records no longer exist, I will obtain and submit to this Court an affidavit from Captain Beck-Harrell attesting to the circumstances of their nonavailability.

47. Additional Information Pertaining to EDWIN OLIVA.

48. As detailed in Respondent's November 3, 2006 Affirmation, the People did not enter into a secret cooperation agreement with witness Edwin Oliva, who identified defendant at trial as the man whom he heard planning to commit the robbery of Rabbi Abraham Pollock. Defendant claims to the contrary, maintaining in sum and substance that this Office conspired with the Division of Parole to cause Mr. Oliva's work release status to be rescinded, and that ADA Charles Posner then threatened Mr. Oliva that, unless he testified in conformance with his prior written statement, he would not be returned to work release status.

49. The records obtained by subpoena from the Division of Parole confirm, however, that this Office apparently notified the Division of Parole on February 28, 1995, "after he failed to cooperate with DA's office regarding a Homicide investigation in which he may have been a witness." As detailed in Respondent's November 3 Affirmation, this would have been consistent with the practice of this Office to notify the supervising agency when a witness such as Oliva – who has made a prior statement reflecting knowledge of a crime – misses appointments and refuses to cooperate while on probation or supervised release. According to entries made in the Division of Parole file during the period from March 2 through 6, 1995, "per Program Counselor – Mr [?] – subject appeared to be making a marginal adjustment. On 2/28/95, he was remanded on a program failure." An entry dated March 6, 2006, appears to indicate either "court" our

"conf." Our records establish that Mr. Oliva was produced by a Damiani Order on the evening of March 6, 1995, for the purpose of his trial testimony, and that he then testified on March 7, 1995.

C. There is no indication in the Division of Parole records obtained by subpoena that this Office had any involvement in the suspension or reinstatement of Mr. Oliva's work release status. Our sole goal in notifying his supervising agency would have been to be able to be able to speak with him and prepare him for trial. We were able to produce him by appropriate court order when we learned that he was incarcerated at the Ulster Correctional Facility. When ADAs Vecchione and Posner then met with Mr. Oliva on the evening of March 6, 1995, at this Office, he agreed to testify. The next day, ADA Vecchione informed the court and defense counsel that the only promises made to Mr. Oliva were that a letter to Parole would be written recounting the fact of his testimony, and Mr. Oliva would be relocated at the end of his sentence if he so requested. No other promises were made to Mr. Oliva concerning his work release status. Although Mr. Oliva may have inferred that he would not be permitted to return to work release unless he testified, this Office was not in a position to promise that result, and this Office would not and did not make such a promise.

50. Although this Office subpoenaed all records pertaining to Mr. Oliva from the Division of Parole, the return on the subpoena did not contain some of the documents reflected in the appendix to defendant's motion, which defendant may have obtained through FOIL requests some time ago.

51. However, the records of the Division of Parole do reveal that Mr. Oliva has had numerous opportunities to assert the claims that he was threatened by ADAs Posner and Vecchione, that he was offered money by ADA Posner, and that he was forced to testify untruthfully in the manner detailed in the "Oliva Affidavit" appended to the defense motion. The Division of Parole records reveal that Mr. Oliva declined the opportunity to be interviewed prior to his sentencing for the June 1995 robbery that he committed while AWOL from work release only three months after he testified at defendant's trial. The transcripts of Parole Board Hearings on June 9, 1999, and June 5, 2001 – at which Mr. Oliva testified – establish that Mr. Oliva consistently admitted that he committed the June 1995 robbery while on work release. Because his commission of an armed robbery while on work release status was repeatedly found to be grounds for denying him early release, Mr. Oliva seemingly would have informed the authorities of his allegations against ADAs Posner and Vecchione. However, the records of interviews of Mr. Oliva merely cite statements by Mr. Oliva admitting to having committed the June 7, 1995 robbery while on work release because he had reverted to drug use. That Mr. Oliva had never previously voiced the accusations contained in the "Oliva Affidavit," which is dated January 2006, is evidence that the allegations against ADAs Posner and Vecchione are nothing more than recent fabrications solicited by defendant Collins with the assistance of counsel for Mr. Oliva.

52. Of relevance to Mr. Oliva's reluctance to cooperate with our efforts to meet with him in preparation for his trial testimony is the fact that the Division of Parole records reveal that Mr. Oliva resided while on work release with his girlfriend in her

apartment at 126 Graham Avenue in Brooklyn. This was clearly an oversight by the Division of Parole, inasmuch as 126 Graham Avenue was the location of the robbery for which Mr. Oliva was serving a sentence of 1 and ½ to 3 years. Moreover, although there is no reference to this in the "Oliva Affidavit" submitted by defendant, 126 Graham Avenue was also the location of the robbery and murder of Rabbi Pollock, and it was in the neighborhood frequented by the friends and family of defendant Collins, who had repeatedly threatened and intimidated other witnesses and their families, causing them to fear for their lives. Thus, Mr. Oliva's failure to keep appointments with this Office almost certainly reflected outside pressure being brought upon him not to testify rather than, as defendant now claims, that his written statement was not truthful. Moreover, legitimate concerns for Mr. Oliva's safety while he testified may have contributed to the Division of Parole's decision to revoke or suspend his work release status during defendant Collins' trial. That inference is reinforced by the fact that, prior to allowing Mr. Oliva to return to work release following his testimony, he was required to sign a waiver, acknowledging that his life was in danger because of his testimony. See Defense Appendix at 314.

D. Additional Information Relevant to ADRIAN DIAZ

E. As detailed in Respondent's November 3, 2006 Affirmation, this Office did not enter into a secret cooperation agreement with witness Adrian Diaz regarding his probation status at the time of his testimony.[22]

53. With regard to Mr. Diaz, Respondent has received, pursuant to a subpoena made returnable to this Court, a copy of the records maintained by the Department of Probation. As previously represented to me by David Yin, Associate General Counsel to the Department of Probation, Mr. Diaz's file contains *no* evidence that there has been an adjudication that Mr. Diaz was in violation of the terms and conditions of his probation, but establishes instead that Mr. Diaz's probation status terminated routinely on the scheduled date, three years after the imposition of a sentence of three years' probation. Furthermore, the file contains no evidence that this Office played any role in the decision whether to pursue parole violation proceedings. To the contrary, the records establish that this Office alerted the Department of Probation to Mr. Diaz's whereabouts in Puerto Rico.

54. With the assistance of James F. Imperatrice, Chief Clerk, Criminal Term, Kings County Supreme Court, the official Supreme Court file of Adrian Diaz was finally located and produced in this Part. Respondent has made and reviewed a copy of that file, which establishes that Mr. Diaz was sentenced, as a Youthful Offender, on December 15, 1993, to a three-year probated sentence upon his guilty plea to the misdemeanor count of

criminal sale of a controlled substance in the seventh degree, as charged under Supreme Court Information Number 12753/93. The file does not indicate that a violation of probation adjudication proceeding was thereafter conducted.[23]

55. As detailed in Respondent's November 3, 2006 Affirmation, Mr. Diaz testified at defendant Collins' trial on March 10, 1995, and we elicited from him on direct

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[22] This is consistent with the statement attributed to Adrian Diaz by counsel for defendant Collins at page 392 of the defense appendix: "They never did, they never gave me anything. . . . They never had offered me anything."

[23] However, the Supreme Court file contains a pro se motion dated August 2, 2002, purportedly signed by "Adrian Diaz," seeking a copy of his presentence report for purpose of petitioning for a pardon from the governor. The notice of motion, the affidavit, and the affidavit of service consistently misspell Mr. Diaz's first name as "Adrain," and the signature does not appear to match other examples of Mr. Diaz's signature.

The notice of motion and affidavit of service also list Mr. Diaz's address as "111 Humboldt Street, Apartment 6J, Brooklyn." On information and belief, Adrian Diaz has never lived at that address. Moreover, the transcript of the alleged telephone conversation between defendant Collins (posing as an employee of this Office) and someone alleged to be Mr. Diaz, represents that Mr. Diaz resided in Massachusetts in 2002.

However, and as acknowledged in paragraph 142 at page 55 of counsel's affirmation, defendant Collins resided with his family at 111 Humboldt Street, Apartment 6J, at the time of his arrest for the 1994 murder of Rabbi Abraham Pollock.

The pro se motion by "Adrain" Diaz was granted by decision dated October 28, 2002 (Knipel, J), and the decision was mailed by the clerk of the court to 111 Humboldt Street. On information and belief, this Office has never been informed of or asked to state our position with regard to a pardon request by Mr. Diaz.

Information contained in Mr. Diaz's probation report – including Mr. Diaz's date and place of birth, social security number, the name of the mother of his child, and the name of his brother – is reflected in what the defense represents to be the audiotape of the

examination that he was then on three years' probation for the 1993 misdemeanor drug case. On that same date, ADA Michael Vecchione spoke by telephone with Probation Officer J. LaViness, informing him that this Office had located Mr. Diaz in Puerto Rico, where he had fled out of fear of defendant Collins. ADA Vecchione further informed Officer LaViness that this Office was returning Mr. Diaz to Puerto Rico out of concern for his safety. (That same concern for the safety of other witnesses had caused this Office to move witnesses and their families to safe locations.)

56. Mr. Diaz's Probation File contains a "Specification(s) of Alleged Violation of Probation" form dated March 20, 1995, which states that Mr. Diaz had failed to report to his probation officer since August 4, 1994.

57. On that same date, March 20, 1995, the Department of Probation prepared a Violation of Probation Report to Judge Meyer, who had sentenced Mr. Oliva as a youthful offender to three years' probation on December 15, 1993, with an expiration dated of December 14, 1996. There is no indication that this report was ever forwarded to Judge Meyer. (An appended "Declaration of Delinquency" order, which also was never executed, erroneously states that Mr. Diaz was sentenced on December 15, 1993, to a "5 year" term of probation, which would have been the minimum probation for a felony, not a misdemeanor).

58. On March 17, 1995, ADA Vecchione wrote a letter to Officer LaViness, detailing the substance of his March 10 telephone call.

September 23, 2003, "interview" of Mr. Diaz by defendant Collins, who claims through

59. The chronological case record contained in the Probation file includes an entry for April 21, 1995: "PO called A.D.A. Vecchione. PO explained [illegible] has to be forwarded."

60. As detailed in my November 3, 2006 affirmation, on June 26, 1995, ADA Vecchione wrote a follow-up letter to Probation Officer John Dawson, explaining again that Mr. Diaz had feared for his life because he was a witness at a murder trial. ADA Vecchione also provided Mr. Diaz's address in Puerto Rico, "with Mr. Diaz's knowledge and consent." ADA Vecchione made no recommendation with regard to Mr. Diaz's probation status or any other matter.

61. The Probation Department's file does not include an executed order finding Mr. Diaz in violation of probation. Instead, the file contains a printout dated February 26, 1997, from a data entry system ("NYS Division of Probation, Probations Management Information Service"), which indicates that Mr. Diaz's case was "closed" on December 14, 1996. The "reason" specified was "max exp." The term of Mr. Diaz's three-year probated sentence was always scheduled to expire on December 14, 1996.

62. My review of the Department of Probation file thus confirms what was previously told to me by David Yin, Associate General Counsel for the Department of

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his attorney that he falsely represented himself to Mr. Diaz as an employee of this Office.

Probation: A violation of probation proceeding was not instituted against Mr. Diaz, and his three-year term of probation expired, as scheduled, on December 14, 1996.[24]

63. Mr. Diaz's updated NYSPIN report (obtained on September 6, 2006) confirms that he was discharged routinely from probation on December 14, 1996, because of "maximum expiration."

64. Accordingly, defendant's speculation that this Office intervened on Mr. Diaz's behalf with the Department of Probation as part of a secret cooperation agreement which resulted in the extension of his probation for two years is not supported by the records of this Office, by the records of the Department of Probation, or by the records of the Supreme Court. Indeed, to the contrary, the records of this Office establish that ADA Vecchione affirmatively informed the Department of Probation of Mr. Diaz's specific whereabouts, appropriately leaving it to the Department of Probation to take any action deemed appropriate by that agency under all the circumstances known only to it.

65. The power of this Court to vacate a judgment based on newly discovered evidence is purely statutory and may be exercised only when the defendant has

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[24] This is consistent with the NYSPIN report obtained by this Office on Friday, March 3, 1995, shortly before the start of defendant's trial on Monday, March 6, 1995. That report indicated only that Mr. Diaz was on probation until December 14, 1996; there were no warrants for his arrest.

To the extent that the defense motion has appended an affidavit from "Donna M. Daiute, which was notarized on December 4, 2004, the information about Mr. Diaz that Ms. Daiute represents she obtained by asking a clerk at the Brooklyn office of the Department of Probation is not correct. Mr. Diaz was sentenced to three years'

affirmatively met the requirements contained in C.P.L. § 440.10(1)(g). Defendant has not made good on his representation that he has discovered credible new evidence, supported by sworn allegations of fact, which is material to an issue at his trial, that would not have been cumulative to the evidence that was introduced at trial, that would not merely have impeached or contradicted evidence that was introduced at trial, and that, if it had been introduced at trial, would probably have resulted in a verdict more favorable to the defendant. C.P.L. § 440.10(1)(g). See People v. Salemi, 309 N.Y. 208, 216 (1955), cert. denied, 350 U.S. 950 (1956); People v. Senci, 133 A.D.2d 432, 433 (2d Dep't 1987); People v. Balan, 107 A.D.2d 811, 814 (2d Dep't 1985).

66. Defendant has failed to establish that any secret cooperation agreements were entered into by this Office with witnesses at defendant's trial. Defendant has further failed to establish that the People lied about or misstated the limited promises that had been made to its witnesses, that the People withheld exculpatory evidence, and that the People otherwise engaged in intentional misconduct before or during the trial. Defendant has thus failed to meet his burden of establishing the actual existence of credible, newly discovered evidence that the judgment was procured by duress, misrepresentation, or fraud on the court (C.P.L. § 440.10[1][b]), or newly discovered evidence of improper and prejudicial conduct that actually resulted in the judgment (C.P.L. § 440.10[1][f]).

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probation, not five; his maximum expiration date was in 1996, not 1998, and he was not adjudicated in violation of his probation.

WHEREFORE, and for the additional reasons set forth in Respondent's papers dated November 3, 2006, the relief sought should be denied. In the alternative, a hearing should be ordered at which defendant is held to his burden, pursuant to C.P.L. § 440.30(6), of proving by a preponderance of the evidence every fact essential to sustain the allegations contained in his motion. Following that hearing, Respondent will request an opportunity to submit additional papers in opposition to this motion.

Dated: Brooklyn, New York
November 9, 2006

Monique Ferrell
Assistant District Attorney
(718) 250-2492

APPENDIX III

SECOND SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION TO VACATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 34

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JABBAR COLLINS,

Defendant.

SECOND SUPPLEMENTAL AFFIRMATION IN RESPONSE AND IN OPPOSITION TO MOTION TO VACATE; IN RESPONSE TO DEFENDANT'S REPLY, AND IN RESPONSE AND OPPOSITION TO DEFENDANT'S DEMAND FOR DISCOVERY

Kings County
Indictment Number
2884/94

MONIQUE FERRELL, an attorney admitted to practice in the State of New York and an Assistant District Attorney in the County of Kings, affirms the following to be true under the penalties of perjury:

67. This Affirmation is in response and opposition to two sets of papers filed by counsel for defendant Jabbar Collins that relate to defendant's motion to vacate that is pending before this Court. The first, dated November 29, 2006, consists of a demand for "Access to Evidence in the People's Possession," but which replies to the People's November 9, 2006 Supplemental Response in Opposition to Motion to Vacate Judgment and Related Motion, in which Respondent addressed at this Court's request the absence of any provision for discovery in C.P.L. article 440. The second, dated December 1, 2006, consists nominally of defendant's Reply to the People's November 3, 2006 response in opposition to the motion to vacate, and to the People's November 9, 2006

supplemental response. However, as discussed further below, defendant has inserted into this Reply a new claim that he did not include in his original motion, having failed to seek permission from this Court to amend that motion.

68. The following statements are made upon information and belief, based upon my examination and review of the relevant records and files of the Office of the Kings County District Attorney, and upon such other records, files, and conversations as may be detailed herein.

69. Defendant preposterously asserts that the "PEOPLE ADMIT, OR DO NOT DISPUTE, VIRTUALLY ALL THE UNDERLYING FACTS THE DEFENSE ALLEGES SHOWING THAT BRADY/VILARDI MATERIAL WAS WITHHELD AND THAT THE PROSECUTOR LIED TO OR MISLED THE COURT, THE DEFENSE, AND THE JURY AT TRIAL." Contrary to defense counsel's assertions, Respondent has neither conceded nor admitted any of the allegations which counsel has thus far advanced. In so claiming, counsel ignores that Respondent has expressly denied and refuted, without reservation, each claim and allegation advanced by defendant, and Respondent continues to deny and refute those claims as well as the additional allegations included in the papers now before this Court.

70. In order to avoid any further confusion, the undersigned, on behalf of Respondent and under penalty of perjury, expressly denies each and every allegation advanced or insinuated by counsel, including, without limitation, allegations of misconduct, misrepresentation, and deceit. In sum and substance: **Respondent entered into no undisclosed cooperation agreements with trial witnesses; Respondent has**

not withheld or conspired to withhold exculpatory evidence from defendant, and Respondent has not misled the trial court, this Court, or defendant concerning such non-existent evidence.

71. This denial and refutation applies without limitation to each claim, accusation, allegation, and insinuation that has been advanced to this date by counsel, regardless of whether Respondent has or has not chosen to adopt the precise manner in which counsel has articulated those claims, accusations, allegations, and insinuations. In other words, the content of affirmations, affidavits, and memoranda previously submitted or hereby submitted by Respondent do not reflect a concession or admission of claims that are addressed or not addressed in any one or more such affirmations, affidavits, or memoranda.

72. Counsel for defendant unequivocally and repeatedly states in the papers at issue that the undersigned has lied and willfully included false information in prior submissions to this Court, and counsel asserts that the undersigned will continue to do so. Counsel should know that these accusations – which counsel chooses to advance in his so-called memoranda of law rather than, under penalty of perjury, in his signed affirmations – are untrue. Respondent will not further acknowledge these outrageous and gratuitous allegations herein; however, Respondent will, with this Court's permission, do so on the record at the next scheduled court appearance.

73. Defendant's Demand for Discovery and Compulsory Process

74. With regard to defendant's "Motion to Access Evidence in the People's Possession, under C.P.L. § 440, Brady, and the Compulsory Process Clause of the Sixth

Amendment," Respondent respectfully addresses this Court's attention to Respondent's previously filed Affirmation in which it is explained that defendant has no present constitutional or statutory right to obtain the records and files that he seeks. Respondent will not repeat that discussion, but will address certain of defendant's counter-arguments.

75. Defendant claims that he has the right to obtain the records and files at issue by subpoena duces tecum. Accordingly, defendant moves this Court "to deem our request a subpoena or to give the defense leave to serve such a subpoena on the District Attorney's Office" (Def. Memo. at 7).

76. Defendant's motion must be denied. First, while CPL 440.30(1) permits the submission by the defendant of "documentary evidence or information" in support of the allegations made in the post judgment motion, nowhere does the Criminal Procedure Law authorize the use of compulsory process to obtain such evidence prior to the court's ordering a hearing on the motion. At this stage of defendant's motion practice, his rights to the records and files of this and any other agency is proscribed by the Freedom of Information Law.[25]

77. By its terms, C.P.L. § 610.20 pertains solely to a court's power to issue a subpoena "in any criminal action or proceeding in such court." C.P.L. § 1.20(16) provides that a "criminal action" terminates with the imposition of sentence. Accordingly, the criminal action in which defendant was prosecuted, convicted, and sentenced is no longer pending in this court.

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[25] Defendant has continued to serve demands under FOIL on this and other agencies, seeking to obtain some of the records at issue. Similarly, defendant is continuing to pursue his claim in

However, C.P.L. § 1.20(18) provides that a "criminal proceeding" is any proceeding which constitutes a part of the criminal action or a proceeding which occurs in a criminal court that is related to a "prospective, pending or completed criminal action . . . or involves a criminal investigation."

78. By virtue of defendant's motion to vacate the judgment, a "criminal proceeding" is pending before this court. However, pursuant to C.P.L. § 610.20(3), a defendant is entitled to the issuance of a subpoena or a subpoena duces tecum only if the defendant is "entitled to call" that witness in the action or proceeding." Because the mere filing of a post judgment motion pursuant to C.P.L. § 440.10 does not create a right to an evidentiary proceeding in which a defendant is entitled to call witnesses or present evidence, see C.P.L. § 440.30, that same filing does not vest in the defendant the entitlement to the issuance of a subpoena. See People v. Diaz, 195 Misc. 2d 337, 339-341 (N.Y. Misc. 2003). In other words, compulsory process cannot be used by a defendant as a discovery device.

79. Second, a defendant cannot issue a subpoena duces tecum to the Office of a District Attorney. C.P.L. § 610.20(3); see People v. Hall, 179 Misc.2d 488 (1998). If defendant intends to move this Court to issue such a subpoena on his behalf, defendant must comply with all "the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules." Id. Accordingly, defendant's suggestion that this Court can passively deem his unilateral demands for discovery a motion for a subpoena is meritless.

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federal court against the Supervising Judge of the Brooklyn Criminal Court seeking to obtain certain court records pertaining to witness Angel Santos.

80. It would be improper for this Court to sanction the use of a C.P.L. Article 610 subpoena to compel the attendance of a witness or the production of records in a C.P.L. § 440.10 proceeding where no evidentiary hearing has yet been ordered and its parameters defined. If this Court were nevertheless to do so, it would first have to attempt to determine whether the sought witness or evidence would actually be relevant to an issue at the hypothetical proceeding; entertain a motion to quash the subpoena brought by the District Attorney or by the party from whom the People had themselves obtained the records and materials on order of this Court; inspect the produced material in camera to ensure compliance with statutory guarantees of the confidentiality of those records, and conduct proceedings to compel compliance with the issued subpoenas. People v. Diaz, 195 Misc. at 339-341.

81. Defendant also insists that due process concerns demand that he have unfettered access to the entirety of the records and files of this Office pertaining, in any manner, to the investigation and prosecution of his crimes, as well as to the records and files of other State agencies pertaining to witnesses who testified for the People at defendant's trial. Defendant does so based upon nothing more than (i) the claim that the People have access to them while he does not, and (ii) the repeated claims of defense counsel that the People and the undersigned are lying about and withholding evidence which defendant assumes is exculpatory because he speculates that it may be relevant to his various Brady claims.

82. With regard to the first contention, Respondent notes that it appears that defendant has already acquired possession, properly or improperly, of virtually

everything that he seeks to obtain from or through the People and other agencies. Furthermore, defendant's theory that due process demands that he have access to everything in the possession of the People is ludicrous. Such a standard does not apply before or during trial, when a defendant is presumed innocent, much less after a trial at which the defendant has been convicted.

83. With regard to the second contention, Respondent notes that such spurious and unfounded allegations do not constitute grounds compelling discovery that is not authorized by statute. Furthermore, even when defendant identifies a particular document or record relied upon by the People, he fails to establish that or how the document is reasonably likely to be exculpatory. The potential that material *may* contain exculpatory evidence will not support the issuance of a subpoena duces tecum. The Court of Appeals has made clear that the movant must assert as "a factual predicate" that it is "reasonably likely" that the materials sought will bear both relevant and exculpatory evidence. People v. Gissendanner, 48, N.Y.2d 543, 550 (1979). Although defendant contends that he is entitled to any evidence that he believes may be relevant in some manner to his Brady claims, defendant himself acknowledges, "Mere speculation or conjecture will not suffice" (Def. Memo. at 9) (quoting United States v. Bin Laden, 126 F. Supp. 2d 290 (S.D.N.Y 2001).

84. There is no merit to defendant's insistence that he is entitled to the records maintained by the Department of Probation relating to witness Adrian Diaz and by the Division of Parole pertaining to witness Edwin Oliva solely because the People and the Court are in possession of them (Def. Memo. at 10, et seq.). Defendant is not entitled to

those records under FOIL, and defendant is not entitled to those files under any provision of the Criminal Procedure Law.

85. Furthermore, although defendant claims that Mr. Oliva and Mr. Diaz are cooperating with him in his efforts to obtain their files, in neither the purported affidavit of Mr. Oliva nor in that of Mr. Diaz is there *any* reflection of an awareness that defendant is attempting to do so. Although defendant presumes to speak for Mr. Diaz and Mr. Oliva, the voluntary nature of their "cooperation" with defendant's efforts to invade their privacy and cast them as perjurers has yet to be tested. Defendant obtained Mr. Oliva's defense file through the assistance of an attorney to whom defendant has made at least one monetary payment and who, in a conversation with the undersigned, evinced that his interests may be more closely tied to defendant than to Mr. Oliva. Similarly, as a result of as yet not fully known circumstances, defendant or someone acting on his behalf caused Mr. Diaz's presentence Probation report to be mailed to defendant's home address. Defendant then used the information contained in that report to impersonate an employee of this Office in order to dupe Mr. Diaz into speaking to him. Although defendant has now submitted what he purports to be an affidavit by Mr. Diaz, it is clear that defendant has not disclosed to Mr. Diaz these machinations, or the fact that he secretly recorded their "conversation."

86. Defendant's contention that this Court may not consider the factual representations set forth in Respondent's papers in opposition to the defense motion unless the People provide to defendant documentary proof of said representations is unfounded. Contrary to defendant's claim, C.P.L. § 440.30(1) does not contain a

"prohibition against hearsay." Instead, it requires the moving party to substantiate his claims through sworn allegations of fact. C.P.L. § 440.30(1) does not require the People to submit the documentary evidence relied upon in opposing a motion to vacate. Thus, defendant's contention that, unless the People acquiesce to his demands for discovery, they should not be allowed to rely upon the requested materials in opposing his motion is meritless.

87. Upon request of this Court, Respondent will provide documentary evidence to it. If and when there is an evidentiary hearing, defendant's right under the C.P.L. to access to any such evidence will be determined.

88. Nothing argued much less established by defendant makes out a violation of the rule announced in Brady v. Maryland, 373 U.S. 83, 87 (1963), which is based upon the due process requirement of a fair trial. See United States v. Bagley, 473 U.S. 667, 675-76 (1985); United States v. Agurs, 427 U.S. 97, 108 (1976). The Brady rule creates a prosecutorial obligation of fairness, but it does not displace the adversarial system by creating a constitutional right of discovery. Bagley, 473 U.S. at 675-76; Weatherford v. Bursey, 429 U.S. 545, 559 (1977); see Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992) (purpose of Brady rule is not to supply defendant with all information that might assist in preparation of his defense, but to assure that defendant will not be denied access to exculpatory information only known to the Government).

89. In order to find a Brady violation, three requirements must be satisfied. First, "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." United States v. Gil, 297 F.3d 93, 101 (2d Cir.

2002) (quoting Stricker v. Greene, 527 U.S. 263, 281-82 (1999)). Second, "that evidence must have been suppressed by the State, either willfully or inadvertently." Third, "prejudice must have ensued." Id.; United States v. Madori, 419 F.3d 159, 22-23 (2d Cir. 2005). A defendant is prejudiced where the undisclosed evidence is material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682. See Kyles v. Whitley, 419 U.S. 514 U.S., 421-22 (1995) (same); Agurs, 427 U.S. at 106, 112 (for Brady to be violated, undisclosed evidence must be material to defendant's guilt or punishment); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (for Brady to be violated, undisclosed impeachment evidence must be material).

90. Even assuming that defendant is correct in arguing that a reasonable possibility standard applies in lieu of the reasonable probability standard, defendant has failed to establish that a Brady violation occurred, because the State did not suppress evidence such that tended to show that defendant was not guilty and/or such that impeached a key prosecution witness. The Supreme Court has never held that the Brady rule imposes a duty on the State to disclose information that is not exculpatory, but that is or may be merely helpful to defendant, in that it might assist defendant in the preparation of his defense. See Moore v. Illinois, 408 U.S. 786, 795 (1972) ("no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police and investigatory work on a case"); United States v. Middlemiss, 217 F.3d

113, 123 (2d Cir. 2000) (Brady "does not require the government to disclose all evidence in its possession that might assist defense preparation").

91. Similarly, the Supreme Court has never required the disclosure of information that is not itself exculpatory, but which may lead to exculpatory evidence then unknown to the State. See Wood v. Bartholomew, 516 U.S. 1, 6-9 (1995) (no Brady violation for failure to disclose test results that might have led to additional evidence). Thus, there is no merit to defendant's claim that "[a]ll evidence favorable to [defendant's] Brady-based motion is itself, by definition, Brady material, and must be disclosed to the defense" (Def. Memo. at 7)

92. If the Brady rule differed, and required the production of evidence which was not exculpatory on its face, the State would, in effect, be required to disclose its entire file to the defense. The Constitution has never imposed such a requirement on the State. See United States v. Ruiz, 536 U.S. 622, 629 (2002) ("the Constitution does not require the prosecutor to share all useful information with defendant"); Kyles, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy"). Such a rule would be unworkable because it would be impossible for a prosecutor ever "to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning." United States v. Comosona, 848 F.2d 1110, 1115 (10th Cir. 1988).

93. Defendant's Reply to the People's Response to His Motion to Vacate.

94. Defendant falsely contends that the People have conceded his factual allegations, and accuses the People of lying about the legal implications of those "facts."

In advancing these "theories," counsel relies upon unreasonable and unfair interpretation of isolated bits and pieces of the People's submissions, and counsel further appears to assume that the undersigned was too stupid and/or venal to recognize the implication and import of these "admissions."

95. Respondent will not engage in a point-by-point refutation of counsel's absurd interpretation of Respondent's previously-filed papers in opposition to defendant's motion to vacate. Instead, Respondent respectfully addresses this Court's attention to those previously-filed papers, the contents of which Respondent believes this Court will accurately view as bearing no resemblance to counsel's contrived, inaccurate, and unfounded interpretation.

96. However, certain "facts" which counsel contends have been conceded bear no resemblance to the facts detailed in Respondent's papers. These should not be viewed as reflecting a complete list of counsel's numerous misrepresentations:

A. Mr. Oliva did not refuse to testify. He was not threatened with adverse repercussions if he did not testify, and he was promised *nothing* in return for his testimony aside from a letter to the Parole Board documenting the fact of his testimony. Mr. Oliva's possible subjective hopes were not the subject of any express or implied agreement; therefore, the People objected to defense counsel's misleading summation argument to that effect. The Division of Parole's records do not substantiate counsel's speculation that the Division of Parole violated any laws, rules, or regulations with regard to Mr. Oliva. Even if such rules were violated,

the People were (and continue to be) unaware of and uninvolved in that process.

B. Similarly, while Mr. Oliva may have expressed to his attorney that he hoped to get a deal on his unrelated case, *there was no deal and no offer of a deal*. Mr. Oliva's case was routinely handled, and he was promised and he received no special treatment and no benefit in return for his testimony more than one year later at defendant's trial. Counsel's contention that the People "conspired with Oliva to evade the restriction on plea bargaining under C.P.L. § 220.19(5)(d)" is untrue, reflecting that counsel has little or no familiarity with this aspect of routine criminal practice.

C. The People did not elicit false testimony from Oliva concerning this prior conviction, and the People did not withhold material evidence from the defense or the jury. While Mr. Oliva may have hoped he could get a deal, he *never* made his cooperation contingent upon receiving some quid pro quo. Furthermore, the People disclosed to the defense the fact of Mr. Oliva's prior conviction, and defense counsel was free to delve into its underlying facts if he chose to do so. None of those facts were arguably exculpatory. Defendant's contention that the jury would have discredited Mr. Oliva's testimony had they learned that he had possessed an imitation pistol and that he had initially claimed to be innocent of the larceny is silly.

D. With regard to Adrian Diaz, defendant falsely states that the undersigned admitted that on the day of his testimony "[ADA] Vecchione called the Probation Department to ask them *not* to violate Diaz, claiming that Diaz had fled to Puerto Rico out of fear of [defendant] and following 'repeated threats,' and then sent two lengthy letters beseeching Probation not to violate Diaz because "[a]ny failure to report . . . is directly related to his fear in testifying in this case.'" This is an untrue representation of the facts included, under penalty of perjury, in my earlier affirmation. As stated therein, ADA Vecchione did nothing more than inform the Department of Probation of Mr. Diaz's whereabouts and why he had left the jurisdiction. ADA Vecchione did not "beseech" the Department of Probation to treat Mr. Diaz leniently or send "lengthy letters" seeking such treatment.

E. With regard to the 911 tape, while the People are unable to prove that the 911 tape was provided to Attorney Michael Harrison, defendant proffers no proof to the contrary. In fact, counsel relies upon the preposterous theory that Attorney Harrison "would have assumed, from [ADA] Vecchione's failure to produce the tape, that [ADA] Vecchione had never obtained it from the Police Department before the tape was routinely destroyed"! Inasmuch as the People provided the Sprint report and the 911 summary to Attorney Harrison approximately one year before the trial, it is inconceivable that Attorney Harrison did not receive the tape

> and then dumbly assumed that the tape had been destroyed without first inquiring of the People or of the Court. Nothing involving Attorney Harrison's conduct of the defense lends credence to such supposition. In any event, where the People disclosed the existence of the tape, provided the Sprint report and the 911 log to counsel, defendant's contention that this Court must infer that the People then withheld the tape from counsel is ridiculous.

97. Counsel has also submitted new "evidence" consisting of affidavits by defendant and Adrian Diaz, the recitation by counsel of the substance of a conversation with Attorney Michael Harrison (who represented defendant at trial), the affirmation of Attorney Roland Acevedo (who assisted defendant in obtaining from defense counsel the file pertaining to Edwin Oliva), and what he represents as the affidavit of Adrian Diaz. Counsel proffers no explanation for his failure to include this "evidence" in his original motion.

98. In any event, assuming that counsel has accurately reflected the substance of a conversation with Attorney Harrison, such a recitation cannot substitute for a statement under penalty of perjury or testimony under oath by Attorney Harrison. Furthermore, in view of the fact that defendant has repeatedly accused Attorney Harrison of ineffective assistance (as defendant continues to do in the instant motion), it is reasonable to infer that Attorney Harrison was less than forthcoming in his conversation with counsel for defendant, fearful that he would provide additional grounds for defendant to advance against Attorney Harrison. As stated by Respondent in its initial

papers in opposition to the motion, Mr. Harrison informed the undersigned that, upon being subpoenaed to testify, he would offer testimony favorable to the People in opposing defendant's motion.

99. Defendant Collins' affidavit is self-serving and of little if any import. Interestingly, however, while defendant admits to having posed as an employee of the Kings County District Attorney's Office in order to trick Mr. Diaz and secretly record a conversation with him, defendant omits any reference to the circumstances under which Mr. Diaz's Probation Report (which contained the personal information which defendant used so effectively to perpetrate this hoax) was mailed to defendant's home address, where numerous members of his family who frequently visit defendant still reside. Furthermore, defendant omits any reference to his $300 payment to Attorney Roland Acevedo, who assisted defendant in obtaining the file of his client, trial witness Edwin Oliva.

100. The affirmation of Attorney Acevedo misstates the content of the conversation between him and the undersigned which is documented in the People's initial papers in opposition to the motion. In contrast to his affirmation, Attorney Acevedo expressed ignorance as to when and by whom the handwritten affidavit allegedly signed by Edwin Oliva was drafted. Furthermore, Attorney Acevedo *did* volunteer that he had devoted dozens of hours in assisting defendant in obtaining Mr. Oliva's defense file, and he refused to confirm or deny whether defendant had paid him for that service. Notably, Attorney Acevedo makes no reference in his affirmation to a $300 payment from defendant's inmate account that was mailed to Attorney Acevedo's

law office. With regard to his documented visit to defendant at Greenhaven Correctional Facility,[26] Mr. Acevedo did not proffer the explanation included in his affirmation, while he did inform the undersigned that he never told Mr. Oliva about that visit.

101. The purported affidavit of Adrian Diaz[27] is interesting for what it does not disclose: that defendant tricked him into discussing his trial testimony by pretending to be an employee of this Office and that someone caused a copy of Mr. Diaz's Probation Report to be mailed to defendant's home address. Absent a sworn statement by the investigator hired by defendant who allegedly obtained this affidavit concerning the representations he made to Mr. Oliva, the reliability of its contents – including the disavowal of any fear of the man who had sent the investigator to find him – is subject only to question. Furthermore, even the arguably adverse representations contained in the affidavit are vague and unreliable: Mr. Oliva does not purport to identify the individuals who allegedly made promises to him, nor does he claim that his testimony was in return for those promises. Finally, it is noteworthy that Mr. Oliva does not claim that he falsely identified defendant as the killer of Rabbi Abraham Pollock.

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[26] Although Mr. Acevedo reports that he did not visit defendant but that defendant was invited by a client to join a meeting with Mr. Acevedo, the facility records establish that Mr. Acevedo logged in as a visitor to defendant. The undersigned did not ask Attorney Acevedo whether Attorney Joel B. Rudin accompanied him on that visit because the facility records establish that Attorney Rudin did not do so.

[27] Although Respondent is in possession of a copy of a copy of this affidavit which counsel mailed to this Court on or about December 13, 2006, the copy does not reflect the "embossed stamp of Notary Public Nancy Torres," as stated by counsel. Respondent therefore reserves the right to challenge the admissibility of this affidavit upon having had an opportunity to examine it.

102. Finally, counsel has, without first seeking leave of this Court, presumed to add an additional claim to his motion seeking vacatur. That claim consists of the allegations that (i) witness Angel Santos received consideration concerning the disposition of a 1995 summons for disorderly conduct in return for his testimony, or (ii) that Mr. Santos was coerced into testifying through the People's handling of that summons, and (iii) that the People misled the court and the defense concerning this alleged arrangement with Mr. Santos. This Court should refuse to allow defendant to amend unilaterally his original motion to include this new claim. Counsel admits that defendant has been in possession of the "evidence" that counsel has appended to the current motion since June 2004, yet counsel proffers no explanation for his failure to include this claim in the motion when he originally filed it, or for his failure now to move to amend that motion by the inclusion of the new claim.[28]

103. Should this Court grant defendant permission to amend his motion by the addition of this new claim, the People respectfully request additional time to complete its on-going efforts to acquire the evidence and information needed to refute it and to then

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[28] Counsel neglects to acknowledge that he did not include this claim in his original motion, stating only in his affirmation: "I have annexed as an exhibit documents received from my client concerning the Criminal Court case in 1995 of Angel Santos. The significance of these documents is explained in the accompanying Reply Memorandum of Law." In that Memorandum, counsel states, "In our notice of motion, we requested discovery of the prosecution's case file for People v. Angel Santos, Kings County Criminal Court Docket Number 95K669679X (Notice of Motion at 2)." Counsel then goes on to state, "*We sought this file because the case strongly suggests"* the three claims enumerated above. Counsel thereby misleadingly appears to represent that he had articulated those grounds in the original motion, when he did not. Indeed, counsel did not include any explanation whatsoever for his demand to discover the summons file. Therefore, the motion, as filed by defendant, did not put Respondent on notice as to the nature of the claim which counsel has advanced for the first time in papers which counsel has denominated as merely a "Reply."

file a response in opposition to it. This Office maintains no record of the issuance or disposition of summonses, which are issued by the Police Department, which are never entered into this Office's case tracking system, and which do not appear on a rap sheet. Therefore, we are attempting to locate the file maintained by the Criminal Court system. Because that file is the subject of litigation in federal court (Jabbar Collins v. William Miller, individually and as Supervising Judge of the Brooklyn Criminal Court, et al), I am receiving the assistance of Assistant Attorney General Lisa Ghartey in obtaining a copy of it. Upon doing so, I will provide a copy of same to this Court.

104. However, Respondent expressly denies and refutes the allegations, and notes that the version of facts detailed by counsel at pages 22 through 24 is no less than questionable. For example, counsel, citing to the transcript of defendant's trial, asserts that Mr. Santos, in handcuffs, was escorted into and out of the courtroom by two detectives. The transcript does not corroborate this representation. Moreover, in order to advance his hypothesized conspiracy theory counsel posits the occurrence of events that simply belie reality, such as Mr. Oliva's returning to court on the summons following the alleged dismissal of the summons. Furthermore, counsel's representation that there was a second or superseding summons is belied by the computerized records created and maintained by the Office of Court Administration that defendant has appended to his memorandum, and I have been informed by Assistant A.G. Ghartey that no other summons was issued. Beyond that, Respondent also has reason to believe that other document(s) included by counsel in his appendix may not reflect reality, and Respondent is undertaking an investigation into that matter.

WHEREFORE, for these reasons and for the reasons previously advanced by Respondent in opposing defendant's motion to vacate and demand for discovery, this Court should deny defendant's motion to vacate and demand for discovery.

Dated: Brooklyn, New York
January 5, 2007

Respectfully submitted,

Monique Ferrell

Assistant District Attorney

718-250-2492

APPENDIX IV

DECISION AND ORDER DENYING MOTION TO VACATE

[*1] The People of the State of New York, Respondent, against Jabbar Collins, Defendant.

2884/94

SUPREME COURT OF NEW YORK, KINGS COUNTY

2007 NY Slip Op 51687U; 16 Misc. 3d 1133A; 847 N.Y.S.2d 904; 2007 N.Y. Misc. LEXIS 6162

September 5, 2007, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: *People v. Collins*, 259 A.D.2d 758, 688 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 3193 (N.Y. App. Div. 2d Dep't, 1999)

HEADNOTES

[1133A] [***904]** Crimes Vacatur of Judgment of Conviction.

COUNSEL: Charles J. Hynes, Esq., District Attorney of Kings County, By: Monique Ferrell, Esq., Assistant District Attorney.

Of Counsel Joel B. Rudin, Esq., For Defendant.

JUDGES: Robert K. Holdman, J.

OPINION BY: Robert K. Holdman

OPINION

Robert K. Holdman, J.

Defendant was found guilty on March 13, 1995 after a jury trial of, *inter alia*, Murder in the Second Degree for the murder-robbery of Rabbi Abraham Pollack.

[*2] Through his retained counsel, defendant filed the instant motion [1] pursuant to CPL 440.10 to vacate his judgment of conviction, and related motions, accusing the People of, *inter alia*, prosecutorial misconduct by allegedly withholding *Brady* material, as well as other issues [2] addressed herein.

1 Defendant's CPL 440.10 motion filed by counsel is undated, but was filed with the Clerk of Court on March 15, 2006.

2 During a case conference both counsel acknowledged that the issues presented are so numerous (in total, approximately one thousand pages of affirmations, legal argument and exhibits were filed) that they declined the opportunity for oral argument.

Of the filings made under this overall CPL 440.10 motion, were two motions - one to this Court and one to the Deputy Chief Administrative Judge - for recusal of *all* justices of the Supreme Court, Kings County and the appointment of a Special District Attorney. These motions were previously, and separately denied.

PROCEDURAL HISTORY

The evidence at trial showed that at approximately twelve o'clock noon on Sunday, February 6, 1994, Rabbi Abraham Pollack was collecting rents from his tenants of 126 Graham Avenue, Kings County. Paul Avery was present inside the building. Avery was a previously homeless man whom Rabbi Pollack permitted to reside in the basement of 126 Graham Avenue in exchange for assisting the building superintendent, Israel Rosado. Rosado was also present inside 126 Graham Avenue at the time of the crime, and observed defendant immediately before the robbery in the vestibule of the building.

Defendant waited for Rabbi Pollack and then accosted him at gunpoint. He shot the Rabbi six times at close range in the abdomen, back and thigh, killing him. Avery, attempting to aid the Rabbi, threw himself at defendant, resulting in Avery being shot in the hip and chest, causing serious physical injury. Defendant then fled with cash and money orders pilfered from Rabbi Pollack.

Rosado, who was in his apartment, yelled out to the street to Angel Santos (Santos is the "common law" husband of Rosado's daughter) to call the police as there was a shooting in the lobby. Rosado saw the robber try to put the gun in his waistband.

Santos went to a furniture store to call 911 and observed defendant running down the street. (All witnesses described defendant as wearing similar clothing.)

Adrian Diaz was in a store, heard five gunshots, observed defendant exit 126 Graham Avenue and place a pistol into the back of his waistband.

A crowd began yelling, "He shot someone."

Louis and Esther Velez both saw the robber running - in the same direction and wearing the same clothing as described by the other witnesses - trying to tuck something into **[*3]** his waistband. Further, Louis Velez found one hundred dollars in cash, as well as a money order in the parking lot through which he observed the robber running. Mr. Velez gave the cash and money order to the police. The money order, which was drawn in payment for the rent, was given to Rabbi Pollack from a tenant of 126 Graham Avenue immediately prior to the robbery.

Eight nine-millimeter shell casings - all later identified as having been discharged from the same handgun - were found at the scene.

An intensive investigation was undertaken by the New York City Police Department, which included anonymous tips and other leads. The police investigation included members of the Ashby family who defendant now alleges may have been involved in the crime.

Ten days after the murder-robbery, Diaz saw defendant in the street and immediately called police. Although Diaz initially thought that a cash reward existed in this case, he nevertheless fully cooperated with the police and District Attorney. Diaz's statements to the police, District Attorney, and his testimony before the Grand Jury and at trial remained wholly consistent.

Both Santos and Diaz identified defendant in separate photo arrays and lineups. Diaz and Santos both made in-court identifications of defendant at trial, as did Edwin Oliva, whose role as a witness is discussed in detail below. (Oliva witnessed defendant planning the robbery. It was also established at the pretrial hearing that Oliva knew defendant for eight years, and identified defendant in a photo array as a confirmatory identification.)

The District Attorney authorized defendant's arrest on March 9, 1994.

At trial, defendant was represented by assigned counsel Michael Harrison, Esq. who is a highly experienced trial attorney, and has tried numerous homicide cases and other complex criminal matters. Trial counsel [3] employed the investigative services of Gerald Crippen, who is now deceased. As court records indicate, Crippen visited the crime scene on numerous occasions, discussed the investigation with defendant, his family and other individuals.

3 Unless otherwise noted, "trial counsel" refers to defendant's trial counsel, Michael Harrison, Esq.

Assistant District Attorney Michael Vecchione was lead counsel for the People, and he was assisted by Assistant District Attorneys Stacey Frascogna and Charles Posner. (ADA Posner was later appointed to the Criminal Court bench, and has since died in office.)

Oliva's Trial Testimony

Edwin Oliva [4] testified as follows: Oliva heard defendant - in the presence of Oliva and Oliva's brother-in-law, Charles Glover - discuss plans to rob Rabbi Pollack. Glover told **[*4]** defendant that he knew that Rabbi Pollack collected approximately four or five thousand dollars in rent money every Sunday. Defendant stated that he planned to lay in wait for the Rabbi and rob him at gunpoint. Although the topic of conversation was initially broached for the purpose of both defendant and Glover to jointly commit the robbery, defendant ultimately declared that he would do the robbery himself. According to Oliva, Glover noted his reluctance since Glover was the only black tenant in the building and that he feared he may be readily identified by the Rabbi or other tenants. Finally, Oliva added that defendant always carried a nine-millimeter pistol.

4 The trial commenced on March 6, 1995. Later that evening, Oliva met with prosecutors and agreed to testify, despite his initial reluctance due to his fear of defendant. Oliva's testimony was consistent with his sworn, written statement made to police within a DD-5.

Trial counsel took full advantage of Oliva's criminal record, and cross-examined on it

extensively. The record reveals that on direct examination, Oliva gave the erroneous perception that he was incarcerated for the previous year, rather than out on work-release; trial counsel highlighted this during cross-examination and summation. Neither did the People correct this misperception. In fact, trial counsel argued to the jury that Oliva testified for the People because he wanted to return to work-release, the lack of evidence of such a "promise" notwithstanding. Finally, trial counsel cross-examined Oliva as to his heroin use, specifically, as to the time he overheard defendant describe his plan to rob Rabbi Pollack.

Diaz's Trial Testimony

Adrian Diaz testified as noted above. Although he did not know defendant by name, Diaz testified that he had seen defendant on many occasions in the Borinquen Plaza projects where defendant resides, and that the two men would routinely greet each other with, "What's up?" when they saw one another.

The record similarly reveals that the People made full disclosure of Adrian Diaz's criminal history, that the People located him in Puerto Rico and that Diaz was serving a three-year probationary sentence for a misdemeanor. Trial counsel utilized the foregoing information in both his cross-examination of Diaz and during summation.

Alibi Notice/Defense Case

Although the defense filed alibi notice - citing defendant's mother and apparently the mother of defendant's child as potential witnesses - defendant elected to not call any witness on his behalf; however, the record reveals that those witnesses cited in defendant's alibi notice, and other family members were present in the courtroom throughout trial.

The defense initially rested without calling any witnesses; however, the trial court permitted defendant to reopen his case and defendant elected to testify. Defendant testified that he resides near the crime scene, and that he was home at the time of the crime cutting hair with family and friends. Further, defendant admitted to knowing Glover, as well as the eyewitnesses, but that they were all mistaken.

Summations

As previously noted, in his summation, trial counsel vigorously challenged the credibility of Oliva and Diaz.

[*5] On his summation, ADA Vecchione argued that his letter to the Parole Board, which cites Oliva's cooperation in the case, was insufficient motivation for Oliva to testify falsely. ADA Vecchione added that it was Oliva who had made his initial statement to police about this case without the promise of any consideration. As to Diaz, ADA Vecchione argued that nothing was given to Diaz that could have motivated him to perjure himself at trial.

Verdict

On March 13, 1995, the jury found defendant guilty of two counts of Murder in the Second Degree (intentional and felony murder) and one count, each, of Attempted Murder in the Second Degree, Robbery in the First Degree, Assault in the First Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree.

CPL 330.30 Motion (Pro Se)

On April 3, 1995, during the scheduled sentencing proceeding, trial counsel requested that the court consider a fourteen-page, *pro se* motion to set aside the verdict on the ground that counsel was ineffective. The motion specifically alleged that trial counsel: (1) should have prevailed in suppressing the identification testimony of Santos and Diaz, because defendant was not represented by counsel during those identification procedures; (2) failed to effectively cross-examine Paul Avery (attempted murder victim) as to alleged inconsistencies between his pretrial statement and his testimony, regarding whether Avery had cut the robber with a knife during the struggle; (3) failed to cross-examine the detective who investigated the murder concerning a DD-5 report of a statement by a non-testifying witness who had believed that she saw the perpetrator shortly after the crime holding his back and with blood on his hand and jacket; (4) failed to cross-examine the detective concerning DD-5 reports documenting that the police had conducted a "city-wide hospital canvass for a male black with stab wounds"; (5) introduced into evidence the photo array when defendant's photograph conveyed that defendant had a criminal history; and (6) failed to prepare and present an alibi defense based upon defendant's testimony that he was with "up to six witnesses" at the time of the crime. Defendant orally supplemented his motion to allege that the evidence at trial was legally insufficient to sustain his conviction.

The trial court noted that when the defense originally rested, it elicited from defendant his understanding that he was giving up his right not only to testify, but also to call witnesses on his behalf. Defendant acknowledged that he had not informed the court of the existence of any witnesses he wanted to call.

In argument against defendant's *pro se* motion, the record reflects ADA Vecchione's observations that defendant's mother, his girlfriend and brothers and sisters were in the courtroom throughout the trial, including the time when the defense originally rested. Further, the record reveals ADA Vecchione's observations that trial counsel constantly and consistently consulted with defendant in "each and every thing that occurred during the trial," including whether to take a recess.

[*6] The record reflects that the trial court acknowledged its observations that defendant's purported alibi witnesses were present in the courtroom throughout the trial, including at the time the defense originally rested. Further, the trial court not only fully confirmed ADA Vecchione's observations based on what the court itself witnessed throughout the trial, but the court also remarked:

As a matter of fact, talking about [defense counsel's] carefulness, I think that that started even with jury selection . . . [defense counsel] did not even pick a juror without first consulting with defendant.

The trial court denied defendant's motion to set aside the verdict.

Sentence

The court sentenced defendant to concurrent prison terms of twenty-five years to life for each murder count (PL 125.25 [1, 3]); to a consecutive term of eight and one-third to twenty-five years for the second degree attempted murder count (PL 110.00/125.25 [1]), and to concurrent terms of twelve and one-half to twenty-five years for the first-degree robbery count (PL 160.15 [2]), five to fifteen years for each of the first degree assault and second-degree weapon possession counts (PL 120.10 [1], PL 265.03), and two and one-third to seven years for the third-degree weapon possession conviction (PL 265.02 [4]).

Violation of Probation: Previous/Unrelated Attempted Robbery Conviction

As to defendant's violation of probation for his previous conviction of Attempted Robbery in the Third Degree (Kings County Indictment Number 8907/90), he was also sentenced to a prison term of one and one-third to four years, to run consecutively to the sentence on Indictment Number 2884/94.

Direct Appeal and Previous CPL 440.10 Motion

Prior to the perfection of his direct appeal by appellate counsel, defendant filed a *pro se* motion to vacate judgment, in which he claimed: (1) he was denied his right to counsel at a preaccusatory investigative lineup; (2) his trial counsel was ineffective for failing to advance at the *Wade* hearing the claim that defendant was denied the right to counsel at the lineup; (3) his trial counsel was ineffective because he introduced into evidence a photo array depicting defendant wearing a police identification tag; and (4) the alleged failure by the People to disclose a Homicide Investigative Report, which contained two statements constituting non-duplicative *Rosario* material.

By decision, dated June 16, 1997, another justice of this Court denied defendant's motion (Lipp, J.). Specifically, the Court held: (1) the record on appeal established that defendant's attorney waived his appearance at defendant's lineup; (2) trial counsel was not ineffective for failing to pursue a claim that defendant was denied the right to counsel at the lineup when defendant's former counsel had waived that appearance at the lineup; (3) trial counsel was not ineffective for utilizing defendant's appearance in the photo array to advance **[*7]** the theory that the subsequent lineup identifications were tainted; and (4) the contents of the Homicide Investigative Report were the duplicative equivalent of the taped statements of witnesses provided to the defense.

Defendant's application for leave to appeal the denial of his motion to vacate judgment to the Appellate Division was granted.

On his direct appeal to the Appellate Division [5], defendant's assigned appellate counsel, William L. Ostar, Esq., raised the following claims of error: (1) defendant was denied the right to counsel at the investigatory lineup and the court improperly limited cross-examination of the People's witnesses concerning this issue; (2) the prosecutor belittled defendant's decision to testify after the defense had rested; (3) the evidence of defendant's identity as the gunman was legally insufficient because the descriptions by eyewitnesses varied and the pretrial identifications of defendant were tainted; (4) the hearing court should have suppressed the lineup identifications based upon the suggestiveness of defendant's clothing; and (5) the sentence was excessive; specifically, that the court failed to consider as mitigating factors defendant's prior drug use, his obtaining a GED while incarcerated as a juvenile offender, and that Charles Glover allegedly planned the robbery.

5 Defendant moved, unsuccessfully, to strike assigned appellate counsel's brief, for the assignment of new counsel, and/or to file a *pro se* supplemental brief.

The Appellate Division affirmed the judgment of conviction and order denying the motion to vacate judgment, finding that defendant's claims were without merit, and, further, that defendant's sentences were not excessive. *People v. Collins*, 259 A.D.2d 758, 688 N.Y.S.2d 175 (2d Dept 1999). Leave to reargue was subsequently denied by the Appellate Division.

Leave to appeal to the Court of Appeals was denied. *People v. Collins*, 93 N.Y.2d 1016, 719 N.E.2d 936, 697 N.Y.S.2d 575 (1999).

Freedom of Information Law Requests (FOIL)

In the dozen years since his conviction, defendant has made numerous FOIL requests to a variety of agencies. Several of defendant's FOIL requests resulted in petitions filed pursuant to CPLR article 78.

One such petition, which was referred to this Court by the Clerk of Court, was denied by decision and order, dated July 3, 2007. Defendant's *pro se* petition was denied as it was filed in conjunction with the instant CPL 440.10 motion for discovery of the very same material sought in his CPLR article 78 petition.

Another petition, through which defendant sought the parole records of Edwin Oliva, was denied by the Third Department. *Matter of Collins v. Division of Parole*, 251 A.D.2d 738, 674 N.Y.S.2d 145 (3d Dept 1998).

Finally, defendant is in the midst of federal litigation with the New York City Department of Probation (hereinafter "Probation") as to matters that appear to be related to previous FOIL requests.

Motions to Disqualify All Justices of the Supreme Court, Kings County and to Appoint a Special District Attorney

Defendant, through his counsel, filed a written motion, dated March 15, 2006, by which he sought an order disqualifying *all* justices of the Supreme Court, Kings County, as well as the appointment of a Special District Attorney (County Law § 701).

By written Order, dated March 17, 2006, The Honorable Joan B. Carey, Deputy Chief Administrative Judge, New York City Courts, denied defendant's motion. By written motion dated April 26, 2006, defendant sought an order to (1) disqualify the District Attorney of Kings County (hereinafter "KCDA") from representing the People of the State of New York in defendant's motion to vacate judgment, (2) appoint a Special District Attorney, (3) recuse/disqualify this Court/Judge, (4) disqualify all justices sitting in Kings County, and (5) change the venue/assign defendant's motion to vacate to a justice sitting in New York County.

On August 14, 2006, this Court issued a written decision and order denying these motions.

Defendant's Motion For An Order Permitting Defendant to Renew His Prior CPL 440.10 Motion

Defendant, through his counsel, filed a motion to "renew" defendant's *pro se* motion to vacate judgment, dated February 5, 1997, which the Court has considered as part of defendant's present CPL 440.10 motion.

Counsel asserts that "renewal" of the previously denied CPL 440.10 motion is authorized pursuant to CPLR 2221, while the People maintain the opposite position.

It is defendant's claim that he has good cause to renew his previous motion, based on alleged new evidence, which, *inter alia*, consists of a supposedly undisclosed 911 recording and FOIL requests involving evidence of third-party culpability, i.e., members of the Ashby family. Neither is it disputed, however, that a copy of the 911 recording was provided to defendant in response to a FOIL request in 1997, and, according to defendant's own motion [6], trial counsel was provided with "unredacted DD-5 Complaint Reports and witness statements" related to third-party culpability. Defendant's

motion continues, however, that defendant was allegedly "unaware" of trial counsel's possession of these items.

> 6 *See*, defendant's original, undated motion - affirmation of counsel - at pp. 50-51, " . . . Collins has informed me that he was personally unaware of the police documents at the time of his trial, as his attorney did not provide them to or discuss them with him."

In any event, for those reasons set forth below under this Court's *findings of facts and conclusions of law*, the Court shall consider this motion to renew as encompassing the 911 **[*8]** recording issue and defendant's allegations regarding third-party culpability (i.e., the Ashby's). These issues necessarily include defendant's ineffective assistance of trial counsel arguments related to the Ashby's.

Defendant's Present Motion to Vacate Judgment (CPL 440.10)

The majority of defendant's claims in this new motion to vacate judgment assert prosecutorial misconduct relating to the testimony of three prosecution witnesses: Adrian Diaz, Edwin Oliva and Angel Santos. Defendant's secondary claim is that of ineffective assistance of trial counsel.

Some of defendant's sub-issues are interwoven into one or more other primary claims. For instance, defendant claims that trial counsel and his investigator neglected to investigate leads that allegedly point to members of the Ashby family having been involved in the murder-robbery; this claim falls under both defendant's ineffective assistance issue and prosecutorial misconduct claims, the latter alleging that the People failed to disclose documents or information pertaining to the Ashby's.

Edwin Oliva:

In his affidavit [7] that was contemporaneously filed with defendant's instant motion, Oliva recants his trial testimony and asserts that:

> 1. he was on a "long drug binge" when he was arrested in an [unrelated] robbery on March 1, 1994;
>
> 2. detectives questioned him regarding Rabbi Pollack's murder and that they coerced him into signing a statement without reading it;
>
> 3. after his plea of guilty to the unrelated robbery and while he was incarcerated, he told prosecutors that he was "tricked" into signing the statement and that he refused to testify;
>
> 4. prosecutors threatened him with a conspiracy to murder charge if he did not cooperate and he was suspended from a work-release program;
>
> 5. ADA Posner appeared at Oliva's prison and told him that "he had warned [him]";
>
> 6. a "sham hearing" was held by the Temporary Release Committee, and the Committee suspended his work-release due to his refusal to testify;
>
> **[*9]** 7. subsequent to the "sham hearing," KCDA detective investigators arrived at Ulster Correctional Facility and took Oliva to their office where he

agreed to testify falsely, that ADAs rehearsed his testimony with him and that he falsely accused defendant of planning the robbery;

8. in return for his false testimony, he was returned to work-release and declined a "cash reward" that was allegedly offered by ADA Posner;

9. "to [Oliva's] knowledge, ADA Vecchione never wrote to Parole for [his] release" as stated at trial because the "deal was I would be restored to work release and [Oliva] was"; and

10. the affidavit was prepared by defendant's attorney, while in the presence of Oliva's attorney, Roland Acevedo.

7 Dated, January 20, 2006.

The People cite documentary evidence - records of New York State Department of Correctional Services - which reflect that defendant Collins mailed $ 300.00 to Oliva's attorney, Roland Acevedo. (Acevedo submitted an affidavit on this issue, which is discussed below under *findings of fact and conclusions of law*.)

Defendant obtained from the Legal Aid Society (hereinafter "LAS"), a copy of Oliva's file held by his attorney in that case (Superior Court Information no. 2556/94). In his papers, defendant strongly implies a conspiracy between the People, Oliva's LAS attorney, the Court and others to keep secret this alleged "deal" for Oliva to falsely implicate defendant at trial. Defendant also accuses another justice of this Court of having acted "illegally" in accepting Oliva's guilty plea (*see*, no. 45 of defense counsel's affirmation annexed to defendant's motion).

Defendant alleges that there exists a video of Oliva's statement to police. In his affidavit, dated January 20, 2006, Oliva only refers to a signed, written statement that he made to detectives [8]. The People counter that no electronic memorialization of Oliva's statement was made because a "riding ADA" was unavailable, thus necessitating a sworn written statement by Oliva.

8 *See*, Oliva's affidavit, dated January 20, 2006, at P 6.

Adrian Diaz:

On November 1, 1993, Diaz pleaded guilty under Superior Court Information no. 12753/93 to the misdemeanor offense of Criminal Possession of a Controlled Substance in the Seventh Degree (PL 220.03). As part of the negotiated plea, Diaz's misdemeanor conviction was vacated and replaced by Diaz's adjudication as a Youthful Offender (CPL 720.35 [2]).

[*10] While the People allege that they notified the Court and trial counsel that Diaz had received a paid roundtrip ticket to New York from Puerto Rico, as well as hotel accommodations in New York, and that Diaz was on probation for a misdemeanor crack possession case, defendant asserts that: (1) Diaz was in Puerto Rico without the permission of Probation; (2) members of KCDA located Diaz in Puerto Rico and told Diaz that if he returned to New York and testified that KCDA would resolve any issues with Probation; (3) Diaz did

not voluntarily accompany KCDA detectives back to New York; (4) KCDA resolved Diaz's alleged problems with Probation; and (5) Diaz had his period of probation extended by an additional two years.

In response, the People acknowledge that, at the time of defendant's trial, they did notify Probation of Diaz's involvement in this case, that Diaz and other witnesses have been repeatedly threatened by defendant's family and friends, and that Diaz would return to Puerto Rico due to his fear for his safety.

Defendant Collins admits to having impersonated an official of KCDA while engaged in a recorded - but unauthenticated - telephone conversation that he initiated with Adrian Diaz. (The statute of limitations had expired for these crimes before defendant filed the instant motion.)

An affidavit purportedly signed by Diaz and sworn on November 30, 2006, was belatedly filed - not with his original motion, but only months later and after the People cited the lack of any sworn allegations in their response affirmation - by defendant alleging that members of KCDA located Diaz in Puerto Rico, that Diaz was in Puerto Rico without permission of Probation and that Diaz was told that KCDA would resolve any problems he faced with Probation.

Nowhere in his affidavit does Diaz recant any of his testimony or prior statements to law enforcement in connection with this case.

The Court file as to Diaz's case reveals a *pro se* motion purportedly written by Diaz, which is dated August 2, 2002. The motion seeks an order granting Diaz a copy of his pre-sentence report for use in an alleged application for a pardon (Executive Law article 2-A) from the Governor in connection with SCI no. 12753/93. The details regarding this motion, and its applicability to the instant CPL 440.10 motion, are discussed below under this Court's *findings of fact and conclusions of law*.

Finally, defendant claims that the People withheld from the defense that Diaz allegedly tested positive for marihuana.

Angel Santos:

It is defendant's present position that the caller on the 911 recording is someone other than Angel Santos, which, defendant claims would contradict Santos's trial testimony.

Originally, defendant did not submit a sworn affidavit with the instant motion swearing to the purported fact that the 911 recording was not disclosed prior to or during the trial. Similar to the lack of sworn allegations in support of those claims involving Adrian Diaz, defendant submitted an affidavit only in reply to the People's response citing the lack **[*11]** of this sworn allegation as to this 911 recording. Neither did defendant's trial counsel submit an affidavit in support of defendant's claim, despite counsel having been interviewed by both parties.

There is no dispute that numerous documents were provided to defendant during pretrial discovery, including SPRINT and DD-5 reports that cite the 911 recording in question. In fact, the SPRINT report was disclosed approximately one-year prior to trial.

In a separate claim, defendant sets forth nonspecific allegations that Santos received consideration to testify at trial in exchange for a favorable disposition on a Criminal Court simplified information (CPL 100.25, 100.40 [2]; [hereinafter "summons"]), which charged Santos with the violation - not a crime - of Disorderly Conduct (PL 240.20). (This specific issue, to the extent of disclosure of agency documents related to Santos, appears to be part of defendant's lawsuit before the United States District Court.)

Finally, the allegation of the People resolving a summons matter in Santos's favor

was not part of defendant's original moving papers, and was only raised subsequently by counsel in defendant's reply papers, dated December 1, 2006 (more than eight [8] months after defendant filed his motion to vacate judgment). Defendant did not seek permission from the Court to include this newfound accusation.

The Ashby's:

Defendant alleges that he was unaware of the existence of previous investigative leads into the murder-robbery that involve third-party culpability, specifically, members of the Ashby family. The People counter that multiple DD-5s regarding the Ashby's and other leads were disclosed to trial counsel, and that a member of the Ashby family visited defendant in jail two months prior to trial.

Effective Assistance of Trial Counsel:

Defendant alleges that trial counsel was not effective as counsel did not pursue at trial a defense strategy of third-party culpability involving members of the Ashby family.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant's Motion for Post-Conviction Discovery

No general constitutional right to discovery exists in a criminal case, nor did *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) create one. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). There is no independent state constitutional right to discovery. *People v. Colavito*, 87 N.Y.2d 423, 426, 663 N.E.2d 308, 639 N.Y.S.2d 996 (1996); *Matter of Miller v. Schwartz*, 72 N.Y.2d 869, 870, 528 N.E.2d 507, 532 N.Y.S.2d 354 (1988). Since there is no constitutional right to discovery in criminal cases, courts cannot grant discovery where no statutory basis exists. *Matter of Briggs v. Halloran*, 12 AD3d 1016, 1017, 785 N.Y.S.2d 578 (3d Dept 2004); *Matter of Sacket v. Bartlett*, 241 A.D.2d 97, 101, 671 N.Y.S.2d 156 (3d Dept 1998), *lv. denied*, 92 N.Y.2d 806, 700 N.E.2d 320, 677 N.Y.S.2d 781 (1998); *Pirro v. LaCava*, 230 A.D.2d 909, 910, 646 N.Y.S.2d 866 (2d Dept 1996), *lv. denied*, 89 N.Y.2d 813, 679 N.E.2d 644, 657 N.Y.S.2d 405 (1997) (discovery which is unavailable by statute may not be ordered based on principles of **[*12]** due process).

Neither Article 240 of the Criminal Procedure Law, nor any other statutory provision permit post-conviction discovery. Here, there is no statutory basis to grant post-conviction discovery, and this Court will not act in the stead of the Legislature.

Unless this Court orders an evidentiary hearing where defendant would be entitled to call witnesses (CPL 610.20 [3]), his motion for post-conviction discovery or for the issuance of subpoenas duces tecum must be denied. *See*, *People v. Diaz*, 195 Misc 2d 337, 339-341, 756 N.Y.S.2d 838 (Sup Ct, Bronx County 2003).

In any event, as to defendant's motion to access Probation records, those records are subject to a statutorily imposed confidentiality (CPL 390.50 [1]) and may not be disclosed in order that defendant may engage in "an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information [which] would enable him to impeach a witness" or other related purpose at trial. *People v. Kim*, 144 A.D.2d 572, 574, 534 N.Y.S.2d 427 (2d Dept 1988). Similarly, Parole records are held to be confidential. *Matter of Collins v. Division of*

Parole, 251 A.D.2d 738, 674 N.Y.S.2d 145 (3d Dept 1998).

Here, defendant has failed to demonstrate that the disclosure of Probation or Parole records is required even if an evidentiary hearing were to be ordered.

Defendant's Motion For An Order Permitting Defendant to Renew His Prior CPL 440.10 Motion

As previously noted, the Court has considered this motion to renew as encompassing the 911 recording issue and defendant's allegations regarding third-party culpability (i.e., the Ashby's), as well as defendant's ineffective assistance of trial counsel arguments related to the Ashby's. As to any procedural bars to defendant's remaining issues, including those encompassed by CPL 440.10 (3) (c), the Court shall address those separately below.

Defendant's motion for an order permitting him to renew his prior CPL 440.10 motion is denied.

First, defendant argues that CPLR 2221 (motion to renew) is a controlling provision due to the "absence of any contrary provision." Section 440.10 (3) (c) of the Criminal Procedure Law is quite plain in its applicability to this specific claim, thereby negating any assertion that the CPLR governs in this instance. *See also*, Prieser, Practice Commentaries, McKinneys Cons. Law of NY, Book 11A, CPL 440.10.

Second, defendant has not demonstrated that he "was not in a position to adequately raise a ground or issue" in his previous (1997) motion to vacate that he now presents for the Court's consideration. Defendant's motion, as to these claims, is therefore procedurally barred from this Court's review. CPL 440.10 (3) (c).

[*13] Third, defendant offers nothing more than his own allegations [9], which are unsupported by any other affidavit or evidence, and, under the circumstances, there is no reasonable possibility that the allegations are true.

9 Defendant filed an affidavit only after receipt of the People's response, which noted the absence of any sworn allegation in support of this claim.

Because defendant failed to submit an affidavit from his trial counsel or offer an explanation of his failure to do so, defendant's motion is denied without a hearing. *People v. Morales*, 58 N.Y.2d 1008, 1009, 448 N.E.2d 796, 461 N.Y.S.2d 1011 (1983).

Here, trial counsel was quite clear with both parties, as reflected in their affidavits based on each party's conversation with trial counsel, that he would provide an affidavit, "Upon being freed from the constraints of attorney-client privilege [10]." After multiple reply affirmations and affidavits from defendant, with the assistance of his retained counsel in prosecuting this motion, defendant had a long-standing opportunity to obtain an affidavit from his trial counsel by waiving the privilege (CPLR 4503). Defendant effectively refused to execute such a waiver and obtain this affidavit. Neither does defendant, based on the People's response affirmation of November 3, 2006, deny [11] trial counsel's statement that defendant refused to permit counsel to provide an affidavit to either party relative to this motion.

10 *See, e.g.*, People's affirmation, dated November 3, 2006, P 17.

11 Defendant filed multiple reply affirmations subsequent to the People's response of November 3, 2006.

As defendant bears the burden to support those claims set forth in his own motion to vacate judgment before this Court can even consider granting an evidentiary hearing (*see*, *People v. Bacchi*, 186 A.D.2d 663 at 664-665, 588 N.Y.S.2d 619 [2d Dept 1992], *citing*, *People v. Ramsey*, 104 A.D.2d 388, 478 N.Y.S.2d 714 [2d Dept 1984]), his obvious tactical decision to not waive attorney-client privilege and obtain an affidavit from trial counsel constitutes a fatal defect under the facts of this case.

Even if trial counsel submitted an affidavit, it would not necessarily be sufficient to require a hearing. *See*, *People v. Bacchi*, 186 A.D.2d 663, 588 N.Y.S.2d 619, *citing*, *People v. Brown*, 56 N.Y.2d 242, 436 N.E.2d 1295, 451 N.Y.S.2d 693 (1982) (defense counsel's conclusory allegation that he "verily believed" that the People failed to turn over a police report was insufficient to raise a triable issue of fact).

Defendant's motion, as to these claims, is therefore procedurally barred from this Court's review. CPL 440.30 (4) (b), (d).

The disclosure of the existence of the 911 recording is clearly reflected in the discovery and *Rosario* materials provided to trial counsel upwards of one-year prior to trial. Further, Angel Santos testified to the fact that he was in the process of dialing 911 as he observed defendant flee the crime scene. Had defendant not been supplied with a copy of the 911 recording, he certainly could have raised that issue in his previous CPL 440.10 **[*14]** motion.

As to defendant's argument based upon newly discovered evidence of prosecutorial misconduct in failing to disclose what defendant characterizes as exculpatory material, this Court finds that the discovery material made available to defendant before trial and the evidence at trial, contained that material or other sufficient information to allow its discovery with due diligence. *People v. Rossney*, 186 A.D.2d 926, 589 N.Y.S.2d 381 (3d Dept 1992), *lv. denied*, 81 N.Y.2d 794, 610 N.E.2d 413, 594 N.Y.S.2d 740 (1993).

Similarly, defendant was aware of the police investigation of the Ashby's by virtue of the discovery materials. The visit to defendant in jail by a member of the Ashby family [12] only serves to further corroborate this fact. Defendant could have raised in his previous CPL 440.10 motion the ineffective assistance claims surrounding trial counsel's tactical decision to not utilize a third-party culpability defense.

12 This item was not denied by defendant in any of his reply papers.

That defendant was not provided with the 911 recording and documentary evidence, including DD-5s related to the Ashby's, is belied in whole by the record. Moreover, defendant's own admissions that trial counsel was provided with the documents serve to further negate his present allegations.

The record is clear that defendant was intimately involved in every aspect of not only his trial, but even part of the preceding investigation.

First, as previously cited herein, the trial court noted on-the-record, a litany of examples of defendant's input at trial, including the Court's on-record observation that trial counsel, " did not even pick a juror without first consulting with defendant." The People even commented on-the-record that trial counsel did not seek a recess without first consulting defendant, which was corroborated by the trial court's on-record observations.

Second, defendant controlled the trial to such an extent that he made a tactical choice to first not testify or present evidence, only to

subsequently move to reopen his case and testify in his own defense.

Third, defendant filed a fourteen-page, *pro se*, motion to set aside the verdict on the day of his sentencing, which demonstrates defendant's thorough involvement in the most minute aspects of his trial.

Fourth, when defendant was summoned to the precinct for his lineup and waived the presence of counsel, defendant nonetheless brought a friend with him and requested that his friend be utilized as a filler for that lineup. The police granted defendant's request [13].

13 *See*, DD-5, "Subject Present at 90 Sqd.," dated March 10, 1994.

In any event, the Court has considered the aforesaid issues and find them to be without merit. Even if the 911 recording was not provided to trial counsel, defendant has not demonstrated that a "reasonable possibility [exists] that failure to disclose the *Rosario* material contributed to the verdict." *People v. Jackson*, 78 N.Y.2d 638, 649, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991). *See also*, *People v. Machado*, 90 N.Y.2d 187, 681 N.E.2d 409, 659 N.Y.S.2d 242 (1997); *People v. Sorbello*, 285 A.D.2d 88, 729 N.Y.S.2d 747 (2d Dept 2001).

[*15] Neither was trial counsel ineffective by not presenting a third-party culpability defense.

First, the investigator employed by trial counsel performed significant investigative work as manifested by the voucher (County Law 722-c) for said services that was approved by the trial court in the amount of $ 2,500.00 [14] .

14 This amount has not been adjusted to reflect 2007 dollars.

Second, that trial counsel elected to present a misidentification defense, instead of a third-party culpability defense, did not constitute ineffective assistance.

A third-party culpability defense is often a high-risk strategy. Had trial counsel employed this strategy, but failed to produce credible evidence to support it, the jury could have viewed such as a consciousness of guilt on the part of defendant. Certainly, any competent defense practitioner would be wary of such a tactic that could also amount to a self-imposed, *de facto* burden in the eyes of the jury.

To prevail on a claim of ineffective assistance of counsel, defendant must overcome a strong presumption that trial counsel rendered effective assistance. *People v. Walker*, 35 AD3d 512, 826 N.Y.S.2d 142 (2d Dept 2006), *lv. denied*, 8 NY3d 928, 866 N.E.2d 464, 834 N.Y.S.2d 518 (2007). The fact that trial counsel's strategy ultimately proved unsuccessful does not mean that defendant was not provided with "meaningful representation." *People v. Davalloo*, 39 AD3d 559, 560, 833 N.Y.S.2d 576 (2d Dept 2007). *See*, *People v. Berroa*, 99 N.Y.2d 134, 138, 782 N.E.2d 1148, 753 N.Y.S.2d 12 (2002); *People v. Benevento*, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998).

"In any event, defendant failed to make out a prima facie case that there were no strategic or other legitimate explanations for counsel's alleged shortcomings, or that he was deprived of meaningful representation.' " *People v. Broxton*, 34 AD3d 491, 492, 824 N.Y.S.2d 127 (2d Dept 2006) (internal citations omitted).

Here, defendant received the effective assistance of trial counsel.

Defendant's Remaining Allegations

Upon due consideration of all remaining allegations set forth by defendant, the Court

finds them to be wholly without merit, conclusory, incredible, unsubstantiated, and, in significant part, to be predicated upon a foundation of fraud through defendant's own admissions and upon overwhelming documentary evidence. (The relevance of defendant's fraudulent acts to his present claims is discussed below.)

Evidence of Defendant's Fraud [15] *Upon Alleged Witnesses and The Court:*

15 The Court wishes to note that these matters of fraud by defendant are not, in any manner, attributable to defendant's retained counsel on this motion.

I. DEFENDANT POSES AS A DETECTIVE INVESTIGATOR OF THE DISTRICT ATTORNEY'S OFFICE:

[*16] By his own admission [16], defendant impersonated a detective investigator of KCDA when he contacted Adrian Diaz by telephone and made a "secret" recording of that conversation, whether in whole or in part. A recording was proffered; however, its authenticity and veracity are at issue. Defendant awaited the expiration of the statute of limitations (CPL 30.10) for those crimes associated with impersonating a police officer before filing the instant motion.

16 *See*, defendant's affidavit, dated November 27, 2006, PP 11-13.

II. DEFENDANT PERPETRATES A FRAUD UPON THIS COURT BY HAVING FILED A FRAUDULENT MOTION BY POSING AS ADRIAN DIAZ AND SEEKING AN ORDER FOR THE PRE-SENTENCE REPORT OF ADRIAN DIAZ:

As previously outlined, Superior Court Information no. 12753/93 - the matter where Adrian Diaz pleaded guilty to the misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree and was adjudicated as a Youthful Offender with a three-year sentence of probation - contains a motion that was decided by another justice of this Court, purportedly filed by Diaz, for a copy of Diaz's pre-sentence report for use in a pardon application to the Governor. The motion was granted by the Court and a copy of the pre-sentence report was sent to 111 Humboldt Street, Apt. 6J, Brooklyn, New York 11206 (the return address of the motion [17]).

17 An envelope that contained the moving papers with the above return address, and post-marked August 28, 2002, is attached to the motion, which is inside the Court's file. Under separate Order, this Court orders sealed the file under SCI no. 12753/93, which should have been sealed due to Diaz's Youthful Offender adjudication (CPL 720.35 [2]). In addition, the Court orders sealed, the file under SCI no. 12753/93 to ensure the integrity of the contents of said file under the circumstances presented herein.

The stated purpose for obtaining the pre-sentence report is ludicrous on its face. First, the motion was filed in 2002, which was several years after the expiration of Diaz's supervision by Probation. Second, since Diaz was not convicted of a crime by virtue of his Youthful Offender adjudication (CPL 720.35 [2]), it defies all logic that he would request that the Governor pardon him for a crime for

which he was not actually convicted, nor subject to any possible further punishment.

Nevertheless, the evidence is overwhelming that defendant perpetrated this fraud upon the Court.

Upon review of its official file, the Court observes that the motion in question was affirmed in Stormville, New York. Stormville is located in upstate Dutchess County, New York where defendant Collins has been incarcerated at the Green Haven Correctional Facility, including at the time of the filing of the Diaz motion. The return address of the Diaz motion, however, was not any known address of Diaz, but rather, it was defendant Collins's **[*17]** own address and exact apartment number as reflected in this Court's file of defendant Collins, including in his moving papers for this CPL 440.10 motion.

Finally, defendant's own papers and previous motions, FOIL requests and actions pursuant to CPLR article 78 reflect defendant's earlier intentions to secure a copy of Diaz's pre-sentence report, which defendant Collins was not entitled to obtain or view due to the statutorily imposed confidentiality of such reports. CPL 390.50 (1); *People v. Kim*, 144 A.D.2d 572, 534 N.Y.S.2d 427 (2d Dept 1988).

Accordingly, this Court concludes beyond a reasonable doubt that the motion for a pre-sentence report of Adrian Diaz under SCI no. 12753/93, dated August 2, 2002, is a forgery created by defendant Collins and that it was filed with the Court at the direction of defendant Collins in order that he may obtain - and did obtain - a copy of said report to which he was not entitled under law.

III. DEFENDANT SENDS MONEY TO EDWIN OLIVA'S ATTORNEY AND OLIVA'S ATTORNEY MEETS WITH DEFENDANT IN PRISON:

The People cite documentary evidence from the New York State Department of Correctional Services that on November 22, 2005, less than two months before Edwin Oliva allegedly swore to the contents of his affidavit, defendant Collins mailed three hundred dollars ($ 300.00) to Roland Acevedo, attorney for Oliva. The funds were posted to Acevedo's law office in New York, New York. Oliva, as any witness who recants his sworn testimony, faces potential criminal and civil liabilities. Thus, Oliva ostensibly retained Acevedo to represent his interests and advise him in the instant matter.

In his affidavit that is annexed to defendant's initial reply papers, Acevedo expressly acknowledged the existence of this allegation, but he explicitly refused to comment any further on that allegation, citing it as a "private business matter." Here, Acevedo has failed to deny these allegations relative to receiving funds directly from defendant Collins.

Acevedo denied stating to the Assistant District Attorney assigned to this motion that he "volunteered dozens of hours" in assisting defendant to locate Oliva's Legal Aid Society file; however, Acevedo does swear in his affidavit that he "persisted" in obtaining that file.

Further, Acevedo admitted to meeting with defendant Collins in prison. Acevedo qualified his disclosure by stating that he was visiting another named inmate/client of his, and that his client serendipitously asked Acevedo that defendant Collins, whom the client identified as "the inmate law clerk" who was assisting him, be "summoned to the visiting room."

Neither Acevedo's affidavit, nor other evidence, indicate that defendant's retained counsel was present. Had defendant discussed any aspect of this case with Acevedo, even if defendant's retained counsel was present, such conversation would most likely fall outside the

ambit of attorney-client privilege (CPLR 4503) since Acevedo is supposed to represent only Oliva, and not defendant.

While the Court does not reach a finding on the particular matter of Acevedo's **[*18]** conduct, nevertheless, it considers such as quite disturbing, especially when juxtaposed with the foregoing instances of defendant's admitted, and otherwise patent fraud related to this motion.

. . .

"This is not a matter for polite presumptions; we must look facts in the face." *Frank v. Mangum*, 237 U.S. 309, 349, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (Oliver Wendell Holmes, J., dissenting).

The Court cannot ignore evidence pertaining to any of the above three issues (*see*, nos. I, II, and III, *supra*) of fraud and/or questionable conduct when considering the reliability of the purported affidavits of both Edwin Oliva and Adrian Diaz.

It is defendant's burden to support his claims in a CPL 440.10 motion, and this Court must consider the reliability of an alleged recantation in deciding whether to grant an evidentiary hearing on that motion or to summarily deny it. *People v. Fields*, 287 A.D.2d 577, 578, 731 N.Y.S.2d 492 (2d Dept 2001). "Mere conclusory allegations of prosecutorial misconduct are alone insufficient to require a trial court to conduct an evidentiary hearing for the purpose of resolving those accusations." *People v. Brown*, 56 N.Y.2d 242, 246-247, 436 N.E.2d 1295, 451 N.Y.S.2d 693 (1982). *See also*, *People v. Bacchi*, 186 A.D.2d 663, 588 N.Y.S.2d 619.

In his papers, defendant impliedly (and at certain points directly) asserts not only misconduct by the People, but by at least another justice of this Court, as well as a fantastical conspiracy - to hide alleged information from him - between that judge, the People, Probation, Division of Parole, and New York State Department of Correctional Services.

"There is no form of proof so unreliable as recanting testimony." *People v. Lawrence*, 247 A.D.2d 635, 669 N.Y.S.2d 242 (2d Dept 1998), *lv. denied*, 91 N.Y.2d 1009, 698 N.E.2d 966, 676 N.Y.S.2d 137 (1998), *quoting*, *People v. Shilitano*, 218 NY 161, 170, 112 N.E. 733, 34 N.Y. Cr. 358 (1916). *See also*, *People v. Cintron*, 306 A.D.2d 151, 763 N.Y.S.2d 11 (1st Dept 2003), *lv. denied*, 100 N.Y.2d 641, 801 N.E.2d 428, 769 N.Y.S.2d 207 (2003).

The First Department in *People v. Cintron*, *id.*, in affirming the trial court's decision to deny, without an evidentiary hearing, defendant's motion to vacate judgment based on alleged prosecutorial misconduct and an affidavit by the People's main trial witness, recanting his inculpatory testimony, cited the following near-identical aspects to defendant's instant motion: (1) recanting witness's affidavit was made "almost 10 years after defendant's conviction and after the witness had become an inmate of the same prison system in which defendant is incarcerated" (as noted herein, Oliva was returned to prison, on at least one or more occasions after testifying in defendant's trial the same prison system in which this defendant is incarcerated); (2) "the affidavit's account of the incident is incredible both on its face and in light of trial testimony"; (3) "the credibility of the affidavit is further undermined by the fact that it features accusations of gross misconduct committed by the trial prosecutors, which accusations were highly improbable and were specifically denied by the former prosecutor in a detailed affirmation" (ADAs Vecchione and Frascogna both provided detailed affidavits [18], while the late Honorable Charles Posner was deceased before the filing **[*19]** of this motion); and (4) "another affidavit, alleging that the authorities pressured the affiant to give false testimony against defendant . . . was entirely incredible."

18 A KCDA detective investigator also provided an affidavit.

The purported affidavits of Oliva and Diaz, their "recantations" and other alleged "new evidence" cited therein, are conclusory, incredible and otherwise unreliable, and defendant's motion is denied without a hearing. *People v. Edmonson*, 300 A.D.2d 317, 318, 751 N.Y.S.2d 280 (2d Dept 2002), *lv. denied*, 99 N.Y.2d 614, 787 N.E.2d 1170, 757 N.Y.S.2d 824 (2003). *See also*, *People v. LaPella*,185 A.D.2d 861, 587 N.Y.S.2d 364 (2d Dept 1992), *lv. denied*, 81 N.Y.2d 842, 611 N.E.2d 780, 595 N.Y.S.2d 741 (1993).

Edwin Oliva:

A review of the photocopy of the Legal Aid Society file of Oliva's robbery case and the minutes of the plea and sentence reveal nothing inconsistent with the fact that Oliva merely received the promised letter to Parole from ADA Vecchione. Oliva's purported affidavit does not tend to substantiate defendant's allegations that Oliva received a more lenient sentence in return for his testimony against this defendant.

The trial record clearly demonstrates that both trial counsel and the People were thorough in eliciting Oliva's criminal history before the jury. In fact, Oliva was made to appear even less trustworthy by the People's failure to correct Oliva's testimony where he testified to having been convicted of robbery, instead of attempted robbery in 1994, and that Oliva's testimony made it appear that he was incarcerated for the preceding year instead of being out on work-release. (The People did question Oliva regarding his participation in work-release, but the time period was not specified.)

Further, Oliva's allegations that ADA Charles Posner visited him in prison, and that he also attempted to bribe Oliva to testify, are belied by the lack of documentary and other evidence, and are otherwise incredible. *People v. Cintron*, 306 A.D.2d 151, 763 N.Y.S.2d 11. Therefore, these specific allegations are contradicted by the documentation and record as a whole, and are otherwise conclusory, speculative and unsubstantiated. CPL 440.30 (4) (b), (c), (d).

Neither did the justice of this Court who accepted Oliva's plea to the superior court information act illegally by permitting such plea, which occurred prior to the filing of Oliva's indictment in that same case. CPL 195.10 (2) (b). *See*, *People v. Thomasula*, 78 N.Y.2d 1051, 581 N.E.2d 1340, 576 N.Y.S.2d 85 (1991).

Aside from the aforesaid affidavit, there exist no other sworn allegations or documentary evidence to support defendant's claim that Oliva received anything other than the letter to Parole.

As the People affirm, the fact that "video" was stamped on the court file pertaining to Oliva is merely indicative of the fact that the arresting officer was interviewed via a video link rather than in-person at KCDA to process the complaint. Neither does Oliva's affidavit support any of defendant's allegations in regard to a videotaped statement. The Court also takes judicial notice of the fact that in Kings County, the usual practice is to have homicide witnesses make sworn statements on audiotape, not videotape, the latter being reserved for targets of homicide investigations.

Finally, as to those issues already noted regarding the utter lack of reliability as to **[*20]** Oliva's purported affidavit: (1) at trial, it was the People who specifically inquired of Oliva as to work-release, but defendant's trial counsel elected not to pursue the issue. More than a decade later, however, Oliva allegedly recants not only his testimony as to defendant's planning of the robbery of Rabbi Pollack, but effectively asserts that he also perjured himself

regarding his testimony regarding work-release; and (2) the documentary evidence provided to the Court via its subpoenas duces tecum manifests that Oliva has been the subject of a host illegal conduct that occurred after defendant's trial, including continued substance abuse and absconding from work-release.

The written submissions of the People and defendant, including Oliva's purported affidavit, coupled with the trial record and other documentary evidence reviewed by the Court, provide a sufficient basis from which this Court could decide the motion without a hearing. *People v. Cassels*, 260 A.D.2d 392, 393, 687 N.Y.S.2d 681 (2d Dept 1999), *lv. denied*, 93 N.Y.2d 1043, 720 N.E.2d 95, 697 N.Y.S.2d 875 (1999).

For these reasons, and those previously cited, the Court finds the purported affidavit and recantation of Oliva to be completely unreliable, conclusory, incredible and unsubstantiated. *People v. Fields*, 287 A.D.2d 577, 731 N.Y.S.2d 492.

Adrian Diaz:

For the foregoing reasons, the Court similarly finds the purported affidavit of Diaz to be completely incredible and unreliable (*People v. Fields*, 287 A.D.2d 577, 731 N.Y.S.2d 492), conclusory, unsubstantiated and belied by the record and documentary evidence submitted. CPL 440.30 (4) (b), (c), (d). Similarly unsubstantiated is defendant's conclusory allegation that Diaz tested positive for marihuana.

Defendant's allegation that Diaz had his probation supervision extended by two years - or by any amount of time - is entirely contradicted by the documentary evidence and a review of the Court's file as previously noted.

Further, defendant alleges that Diaz received a benefit in exchange for his testimony, in that the People colluded with Probation to ameliorate a supposed violation of probation based on Diaz's presence in Puerto Rico.

Assuming the allegation that Diaz faced a violation of probation for being in Puerto Rico is conclusory, unsubstantiated and contradicted by the Court file and other documentary evidence. Second, and of greater significance, is the fact that if defendant's aforesaid allegations are accepted as true, they are patently self-contradictory. It would be of no benefit to Diaz to have had his probation supervision extended by two years. Thus, the allegations that the People conspired with Probation to *not* violate Diaz because of his trial testimony strains all credulity.

Moreover, Diaz's purported affidavit - which was filed on or about December 13, 2006 (approximately nine [9] months after defendant filed his underlying CPL 440.10 motion in March 2006) - serves to further contradict defendant's conclusory allegation that Diaz involuntarily accompanied members of KCDA from Puerto Rico to New York. Further, as previously discussed, there exist numerous credibility issues as to the Diaz affidavit itself.

[*21] In his purported affidavit, Diaz does not recant his own trial testimony, which was wholly consistent with Diaz's initial report and statements to the police, his statements to prosecutors and testimony before the Grand Jury. It was Diaz who saw defendant in the street several days after the murder-robbery and, on his own volition, without prompting from anyone, called the police to make his report.

Finally, even if the second individual who was part of the recorded telephone conversation made by defendant is actually Diaz, its recording was made under criminal and otherwise fraudulent circumstances, as defendant admits, thereby rendering it as

unreliable. *People v. Fields*, 287 A.D.2d 577, 731 N.Y.S.2d 492.

Angel Santos:

Defendant's remaining allegations as to Angel Santos - that he was afforded consideration by the People for a summons he received for the violation, not a crime, of Disorderly Conduct - are procedurally barred from this Court's review, and, in any event, are without merit.

First, defendant included this belated allegation regarding Santos in his first reply affirmation, which occurred more than eight [8] months after he filed his underlying CPL 440.10 motion. Defendant did not seek leave from the Court to include this new claim, nor did he cite any adequate reason for making this belated claim. In fact, defendant did not cite any reason whatsoever as to why this claim was not included within his original moving papers. Thus, the Court denies leave for defendant to assert this new claim or otherwise amend his motion to vacate judgment.

Second, the documentary evidence presented in support of this claim not only fails to substantiate any of defendant's claim, it actually contradicts it. The summons bears a "date of occurrence" of February 1, 2005, which was merely one-month prior to defendant Collins's trial, as well as the sole count of Disorderly Conduct for "acting in a loud, boisterous manner in public . . . and refused to stop." There was no allegation of resisting arrest, physical threats or otherwise.

The summons [19] is just that a summons. It is the usual practice that when police issue summonses in Kings County (as alleged here), or in any of this State's sixty-two counties, there is no District Attorney involvement in the drafting of those summonses or the selection of charges. Neither does evidence exist to the contrary, i.e., that the People were involved in drafting the summons or in any charging or plea decisions.

19 As previously noted, this is the colloquial term for a simplified information.

The court transcript indicates only the presence of a defendant named Angel Santos, the Court, court reporter, but no representative of the District Attorney. Neither are summonses, under these circumstances, provided by the police nor court to the People. There is no evidence nor indication that the People had any knowledge, imputed or otherwise, of the summons or its adjudication. Angel Santos pleaded guilty to the summons **[*22]** and paid a fine and surcharge.

Further, Angel Santos is far from an uncommon name and the offense charged is not a printable offense. It is therefore entirely conclusory and unsubstantiated that the summons relates to the same Angel Santos who testified at defendant's trial.

Finally, the remaining documentation, including the possibility of a separate summons, is completely unsubstantiated as not even a copy of this alleged summons has been provided. The June 19, 1995 court appearance, which is supposedly related to this second summons, was also conducted without a representative of the People present.

As to an alleged bench warrant from the summons part, which is totally unsubstantiated that the warrant pertains to *this* Angel Santos, the Court takes judicial notice that if a warrant was *recommended* by the judicial hearing officer (JHO) in the summons part on that particular case (a JHO cannot order a warrant), the file would have been merely transmitted to a sitting judge of the Criminal Court to decide whether a warrant should issue without input or

knowledge from any party. Again, this means that even if the allegations were true, the People would still have been unaware of the issuance of the warrant.

In any event, as the offense for which Santos *may* have been charged was not printable, there was no official mechanism for the People to know that Santos received this summons as it would not be reflected on Santos's rap sheet.

Hypothetically, if defendant could substantiate that the summons involves the same Angel Santos, defendant's claim is still unavailing.

First, defendant's affidavit at paragraph nine, merely states, "I do not recall [the Santos summons] being reflected on the rap sheet provided by [the ADA]." "I do not recall" is not sufficient to substantiate an allegation that the information was not provided to defendant at trial.

Second, the revelation that Santos [20] received a benefit by pleading guilty to the sole count of a summons (or even two summonses), which is a violation, not a crime, and was to pay a fine and surcharge for being noisy in public would not have affected the verdict in any manner whatsoever, especially based on the overwhelming evidence of defendant's guilt. Even if an Adjournment in Contemplation of Dismissal (CPL 170.55) was hypothetically granted, neither would defendant's argument be persuasive as a significant amount of Summons Part cases in Kings County receive similar treatment.

20 Again, this assumes that this was the same Angel Santos.

Therefore, defendant's claim relative to Santos and the summons is not only entirely conclusory, unsubstantiated and contradicted by the record, it is largely fanciful, wholly without merit and denied. CPL 440.30 (4) (b), (c), (d).

Brady Issues:

The *Brady* claims set forth by defendant, even if substantiated, are without merit.

Three prongs must be established by defendant in order to establish a *Brady* violation: **[*23]** (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002), *quoting*, *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *United States v. Gil, supra*; *United States v. Madori*, 419 F.3d 159, 22-23 (2d Cir. 2005). Further, a defendant is prejudiced where the undisclosed evidence is material. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 675-676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

In New York, if a defendant makes a specific request for a particular *Brady* item, state courts judge the materiality of the evidence by whether there is a reasonable possibility that the failure to disclose the item contributed to the verdict. *People v. Vilardi*, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990). If there was no request for a specific item or only a general request for exculpatory evidence was made, the failure to disclose such material is a due process violation under New York law only if there was a "reasonable probability" that the evidence

would have affected the outcome of the trial. *People v. Bryce*, 88 N.Y.2d 124, 128-129, 666 N.E.2d 221, 643 N.Y.S.2d 516 (1996); *People v. Stein*, 10 AD3d 406, 781 N.Y.S.2d 654 (2d Dept 2004).

Defendant failed to establish that the People were ever in possession of any such *Brady* material at the time of trial or that it was exculpatory in nature. *People v. Broxton*, 34 AD3d 491, 491, 824 N.Y.S.2d 127.

Assuming, *arguendo*, that certain undisclosed *Brady* material existed, due to the overwhelming evidence of defendant's guilt, there is no reasonable possibility that the failure to disclose this evidence would have contributed to the verdict.

In Camera Inspection of Documents:

The Court has reviewed the documents obtained by the People from various agencies for the Court's inspection pursuant to judicial subpoenas duces tecum. Based upon its review, the Court finds nothing in support of defendant's allegations.

. . .

In sum, defendant's allegations are procedurally barred from this Court's review to the extent specified above, and, nevertheless, are entirely without merit.

Accordingly, defendant's motion to vacate judgment and his related motions are denied without an evidentiary hearing.

SO ORDERED.

Hon. Robert K. Holdman, J.S.C.

Judge of the Court of Claims

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MF5685

JABBAR COLLINS,

Petitioner,

-against-

ROBERT ERCOLE,

Respondent.

08-CV-1359 (DLI) (CLP))

MEMORANDUM OF LAW

IN SUPPORT OF OPPOSITION TO PETITION FOR

WRIT OF HABEAS CORPUS

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MF5685

JABBAR COLLINS,

Petitioner,

-against-

ROBERT ERCOLE,

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08-CV-1359 (DLI) (CLP))

MEMORANDUM OF LAW

DEFENDANT'S PETITION SHOULD BE DISMISSED AS UNTIMELY AND TO THE EXTENT THAT IT IS GROUND UPON CLAIMS THAT ARE PROCEDURALLY BARRED. MOREOVER, THE PETITION SHOULD BE DENIED BECAUSE IT IS WITHOUT MERIT.

STATEMENT OF FACTS

The State relies upon the Statement of Facts contained in Respondent's Affidavit, and in Respondent's Brief to the Appellate Division, and in the Decision and Order of the State Court, which is included as Appendix IV to Respondent's Affidavit.

I

Defendant's Petition For A Writ Of Habeas Corpus Is Time-Barred Insofar As It Is Based Upon A Pattern Of Criminal And Fraudulent Activities, Including But Not Limited To The Submission of Criminally-Obtained And Derived "Evidence" To The Court Below And In This Habeas Petition.

Defendant's conviction became final on November 15, 1999**,** ninety days after the date on which a judge of the New York Court of Appeals denied defendant's application for permission to appeal from the Appellate Division's affirmance of his conviction (People v. McCowen, 2 N.Y.2d 743, 778 N.Y.S.2d 468 [2004]). See Ross v. Artuz, 150 F.3d 97, 98 (2d Cir. 1998). Defendant initiated no state court collateral proceedings during the almost 7 years from November 15, 1999**,** until March 15, 2006, when defendant filed a motion to vacate the judgment pursuant to C.P.L. § 440.10. That motion, defendant's first post-direct appeal collateral proceeding, did not reset the limitations period, unless defendant has established that his claims fall under the tolling provision of 28 U.S.C. § 2244(d)(1)(D), which starts a one-year period on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." See Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam), cert. denied, 531 U.S. 840, 121 S. Ct. 104, 148 L. Ed. 2d 63 (2000).

It is the position of Respondent that defendant delayed long after he was on sufficient notice of the claims of error that he has chosen to pursue in the instant petition as to have raised them well before March 2006, rendering his petition untimely. It is also the position of Respondent, however, that defendant's petition is untimely under any interpretation of 28 U.S.C. § 2244(d) because his state motion to vacate was based upon "evidence" that must be viewed – as it was found by the court below – as the result and the product of a pattern of intentional

criminal and fraudulent activities engaged in by and/or at the direction of defendant. Because defendant elected to rely upon such criminally obtained and fraudulent "newly discovered" evidence, his state motion to vacate was not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2).

Consequently, the initiation and pendency of that State motion should not be viewed as having re-set the statute of limitations. This rightness of that outcome is further dictated by (i) the fact that defendant delayed in filing his State motion in order to allow the statute of limitations to lapse on the prosecution of the crimes he committed in order to secure his "newly discovered evidence," and (ii) defendant has chosen to submit the same criminal spoils under the guise of new evidence in bringing the instant petition.

As found by the court below, defendant engaged in conduct in 2003 that constituted the crime of Criminal Impersonation in the Second Degree when, in order to trick trial witness Adrian Diaz into submitting to an interview about defendant's crimes, he impersonated a member of the investigatory staff of the Office of the Kings County District Attorney. As the People proved and as the motion court also found, in order to obtain the personal information about Mr. Diaz that allowed defendant to perpetrate this fraud successfully, defendant in 2002 had forged or caused to be forged a notarized motion in the name of Mr. Diaz, had filed said motion in the local Criminal Court, and had thereby gained access to a copy of Mr. Diaz's pre-sentence report, which contained highly personal information about Mr. Diaz and members of his family.

In now relying upon the 2003 taped interview in furtherance of his habeas petition, defendant contends that he delayed in bringing the motion to vacate based upon the alleged newly discovered information contained in the recorded interview solely because he needed to

acquire corroboration of its contents. With regard to defendant's commission of the crime of Criminal Impersonation, defense counsel merely argues that such a "ruse" would pass muster if undertaken by a law enforcement officer, thereby failing to address that defendant would have been subjected to indictment and prosecution had he brought the State motion prior to the expiration of the statute of limitations. With regard to defendant's 2002 crimes of Forgery and Offering a False Instrument for Filing, and with regard to the egregious fraud upon the local criminal court perpetrated by defendant in the filing of that motion, defense counsel makes no reference whatsoever. Indeed, defendant in relying upon this evidence in furtherance of the habeas petition, defendant does not deny that he did, in fact, commit each of these crimes and that he attempted to defraud the witnesses and trick the court below into relying upon the results of his crimes as reliable and credible evidence.

As the motion court further found, defendant also engaged in suspect and fraudulent activities in order to acquire "evidence" relevant to his claim that the People had withheld Brady material with regard to witness Edwin Oliva. Defendant attempted unsuccessfully through legitimate means to obtain from the Legal Aid Society a copy of Mr. Oliva's criminal defense file in order to gain access to personal information to which defendant was not authorized access. When those efforts were unsuccessful, defendant paid and met in prison with an attorney who represented defendant's interests while successfully purporting to appear as Mr. Oliva's attorney and gaining a copy of Mr. Oliva's LAS file for defendant's use. The information in Mr. Oliva's file – indeed, excerpts of that file's contents – were then included by defendant in his state motion to vacate the judgment, and those allegations, if accurate and truthful, would have

subjected Mr. Oliva to a prosecution for perjury as a direct result of "his" attorney's cooperation with defendant.[29]

Finally, with regard to witness Angel Santos, defendant in November 2006 attempted to supplement his March 2006 motion to vacate with an entirely new and different claim regarding witness Angel Santos that was based upon "new evidence" that defendant had possessed since 2004 – more than two years before. In support of that claim, which counsel raised without first seeking or obtaining the motion court's permission, defendant contended that the 2004 documentation proved that the People had concealed a cooperation agreement with Mr. Santos pursuant to which he had testified against defendant in return for a favorable disposition of a 1995 charge against Mr. Santos. However, and as found by the motion court, critical portions of the records submitted by defendant as alleged proof of the claim were records that did not involve Mr. Santos but that were selectively presented by defendant in his state motion in order to deceive the court.

All of the above-enumerated "evidence" submitted by defendant to the motion court must properly be viewed of as the fruits of criminal activity that rendered the motion itself an attempt to perpetrate a wholesale fraud upon the State court. Such a fraudulent submission should not now be countenanced by this Court as a "properly filed" motion. This conclusion is consistent with the well-settled New York State and federal principle that a person should not be permitted to benefit from his own wrongdoing. See Simon & Schuster, Inc. v. New York State Crime Victim's Bd., 502 U.S. 1-05, 119 (1991) ("New York has long recognized the 'fundamental

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[29] Significantly, when early in 2006 the same retained attorney subsequently notarized an affidavit allegedly by Mr. Oliva, the contents of the affidavit made no reference to Mr. Oliva's awareness that he had "assisted" defendant – whom he feared – in obtaining access to this private llegal file which the LAS had fought against disclosing.

equitable principle' that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime'" [citations omitted]); Gilchrist v. O'Keefe, 2260 F.3d 87, 92, 97 (2d Cir. 2001) (it is a general proposition that the law will not allow a person to take advantage of his own wrong; certain trial-related constitutional rights may be forfeited by certain types of misconduct); United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) (right of confrontation may be waived by misconduct; if a witness's silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot hen assert his Confrontation Clause rights in order to prevent prior grand jury testimony of that witness from being admitted against hi; "any other result would mock the very system of justice the confrontation clause was designed to protect"); People v. Geraci, 85 N.Y.2d 359, 366 (1995) (same); "while the principle is often characterized as involving 'waiver by misconduct,' it is more realistically described as a forfeiture dictated by sound public policy. Indeed, the courts that have applied the rule have frequently justified it by invoking the maxim that the law will not "'allow a person to take advantage of his own wrong'" [citations and footnote omitted]).

The holding of Hizbullahankhamon v. Walker, 255 F.3d 65 (2d Cir 2001), supports the conclusion that defendant's fraud-based state motion to vacate was not "properly filed" and that the motion did not, as a result, restart the statute of limitations. The Court of Appeals observed that an "'apparent purpose[] of the 'properly filed language . . . [is] to keep prisoners from making bad faith use of state postconviction proceedings to delay the onset of federal habeas corpus proceedings.'" Id. at 72 (quoting James S. Liebnan & Randy Hertz, Federal Habeas Corpus Practice & Procedure § 5.1b, at 236, n.64 (3d ed. 1998). As a result, the Court of Appeals held that the statute of limitations does not authorize tolling "based upon the filing of

creative, unrecognized motions for leave to appeal." Id. at 253 (quoting Adeline v. Stinson, 206 F.3d 249. 254 [2d Cir. 2000).

Certainly, if the statute does not authorize tolling for unauthorized motions to appeal, it also must not authorize the restarting of the limitations clock by the mechanism employed by defendant Collins, a duplicitous motion constituting a gross fraud upon the motion court based upon fraudulently and illegally obtained and manufactured "evidence." There can be no more egregious "bad faith" use of state court post-conviction proceedings than a fraudulently, indeed criminally, manufactured claim based primarily if not entirely upon forged evidence. A motion that constitutes such a flagrant abuse of the judicial process can never be viewed as "properly filed."

Here, if the limitations period were to be deemed to have been revived by virtue of defendant's 2006 motion to vacate, then defendant will receive a benefit as a result of his fraudulent use of the court system, and the purpose of the habeas corpus statute will be frustrated. In view of defendant's strategy of relying upon that same fraudulently obtained evidence in seeking habeas relief, such a result should not be permitted.

II

Defendant Has Otherwise Failed to Meet His Burden of Establishing that His Petition is Timely.

The date on which the limitations clock begins to run for the factual predicate exception is itself a fact-specific question to be reached and resolved by the District Court. See Friedman v. Rehal, 2008 U.S. Dist. LEXIS 1062 (E.D.N.Y Jan. 4, 2008), citing Wims v. United States, 225 F.3d 186, 191 (2d Cir. 2000). Generally, the burden is on the habeas corpus petitioner to establish tolling. Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); see also Mohabir v. Phillips, 05-CV-3855 (RJD) (E.D.N.Y) (petitioner failed to explain why he could not have obtained affidavit from state's witness earlier during four-year period of delay). Here, defendant has failed to meet that burden with regard to each of his grounds, and his petition should be dismissed as untimely. If the District Court concludes that the petitioner unreasonably delayed, then the Court may bar the meditation as untimely. Id.

Such is what transpired here, where much if not all of defendant's delays in filing the state motion that he alleges triggered the restarting of the limitations clock was designed to insulate defendant and others from prosecution for perjury, criminal impersonation, and other felonies associated with the manner in which defendant acquired the evidence upon which the motion was based. This manifestly warrants the dismissal of defendant's petition.

Defendant seeks to excuse the delays by laying blame on the Office of the Kings County District Attorney, the New York State Department of Corrections, Division of Parole, the New York State Department of Probation, and other agencies. According to defendant, these agencies conspired to frustrate his efforts to uncover the concealed evidence of the allegedly secret

cooperation agreements and the unfair tactics he posits were employed against him at his trial by denying his repeated, indeed almost countless, requests pursuant to the Freedom of Information Law. The argument is fatally flawed because defendant ignores in advancing it that *there was and is no evidence of any such agreements or tactics*. As found by the motion court, the evidence that defendant accumulated – to the limited extent it was even relevant – failed utterly and completely to prove his claims and theories: *There were no secret agreements*. *No witnesses recanted*. *No witnesses were coereced into testifying*. *The People did not withhold exculpatory evidence or lie to defense counsel, the court, or the jury*. To the extent that defendant persists in arguing to the contrary, this does not function to excuse the fact that his petition is untimely for the reasons set forth above.

Finally, this Court should disregard the volume of new evidence that counsel for defendant has submitted with regard to the issue of timeliness. Included in the volume is an affidavit by defendant Collins that is dated July 8, 2008, more than 2-1/2 months after the date of defendant's petition, and in which defendant makes numerous factual allegations and representations. Also included is a collection of letters, motions, and other documents that were not before the motion court. In view of defendant's proven history of submitting documents that the motion court found suspect or fraudulent, this Court should decline to consider this submission, which has not been tested by the State court..

Furthermore, the submission in reality relates directly to defendant's claim that Respondent and various state agencies conspired together to cover-up the alleged prosecutorial misconduct engaged in by Respondent before, during, and after his trial. The motion court addressed that claim, finding it to be without merit. Because the motion court did not have an opportunity to review either defendant's July 8, 2008 affidavit or the collected documents to

which that affidavit refers, the claim is unexhausted, and this Court should properly decline to review it.

The Supreme Court has held that when a petitioner attempts to rely on new evidence not presented in state court, he must comply with the restrictions on evidentiary hearings contained in section 2254(e)(2). See Holland v. Jackson, 542 U.S. 649 (2004); Cargle v. Mullin, 317 F.3d 1196, 1209 (10th Cir. 2003) (citing cases); see also William McKethan v. Dominic Montello, 99-CV-6318 Slip op. at 32 (E.D.N.Y. January 25, 2005) (defendant's new affidavit with previously available information was "arguably not before this Court"). If the petitioner "failed to develop" the pertinent evidence in state court, i.e., he failed to act with due diligence, he cannot rely on that evidence in federal court. Holland, supra; Bradshaw v. Richey, 546 U.S. 74 (2005) (a federal court may not rely on facts developed through discovery in federal court without first determining whether the defendant was at fault for not developing the factual basis of the claim in state court or whether defendant satisfied the other criteria of subdivision (e)(2); Banks v. Dretke, 540 U.S. 668 (2004) (Court, citing its decision in Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 [1992], a pre-AEDPA case, held that the petitioner's failure to present evidence that a state witness was a paid informer in the state court would preclude supplementing evidence of this fact at a federal hearing unless petitioner could show "cause and prejudice.

Here, defendant proffers no explanation for he omission of this evidence from his state court motion, and the Respondent expressly objects to its consideration in conjunction with the present petition.

A. Ground: The People Allegedly Withheld a Recording of 911 Calls Placed Regarding the Robbery-Homicide of Rabbi Pollack.

By defendant's own repeated representations in state court and in the habeas petition, he obtained from Respondent a copy of the recording of the 911 calls no later than 1998, pursuant to a pro se Freedom of Information Law (FOIL) request. Defendant's conviction was not yet final, and defendant – an extremely active pro se litigant who had already filed a motion to vacate prior to perfecting his direct appeal and who would file numerous addition FOIL requests with a variety of state and local agencies – could have moved to vacate based upon newly discovered evidence of a Brady violation, pursuant to C.P.L. § 440.10(3). Moreover, defendant could have advanced the claim even before coming into possession of the tape itself, because, as found by the motion court, the trial record overwhelmingly established that the tape existed.

Defendant did not do so, waiting to raise the claim until he included it in his March 2006 motion to vacate. As sole explanation for the 8-year delay, counsel for defendant asserts that not until March 1, 2006, did defendant obtain the results of tests by a "voice recognition expert" to determine whether any voice on the tape was that of Angel Santos.

28 U.S.C. § 2244(d)(1)(D) only serves to delay the accrual of the one year limitations period until the date on which the "factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence," and it applies only "to a claim for which the factual predicate is neither known nor reasonably discoverable at the time the petitioner's judgment of conviction becomes final." Wims v. United States, 225 F.3d 186, 188-91 (2d Cir. 2000); see Smith v. Powers, 2008 U.S. Dist. LEXIS 47299, 5-6 (W.D.N.Y. June 13, 2008). Here, because the trial record established the fact of the existence of the tape, and where

defendant acquired a copy of that tape in 1998 – before the judgment of conviction became final – defendant's 2006 motion Brady claim did not function to restart the statutory limitations clock.

Section 2244(d)(1)(D) does not delay commencement of the limitations period while the prisoner merely gathers evidence or information to support a claim. Once defendant became aware of the existence of the tape – which he asserts was in 1997, the statutory clock began to run on the Brady claim that he did not raise until his March 2006 motion. See Foy v. Sabourin, 2004 U.S. LEXIS 4582 *9-10 (S.D.N.Y. Mar. 23, 2004) (new evidence of a known fact does not constitute newly discovered factual predicate to a claim within the meaning of U.S.C. § 2244 [d][1][D]); Youngblood v. Greiner, 1998 U.S. Dist. LEXIS 16037, *4, n.4 (S.D.N.Y Oct. 8, 1998) (limitations period began when petitioner because aware of claim of illegal search and witness tampering – not when he later received documents affirming the tampering); see also Clancy v. Phillips, 2005 U.S.Dist. LEXIS 13179, *14-15 (S.D.N.Y. Jun. 30, 2005); Flanagan v. Johnson, 154 F.3d 196, 199 (5th Cir. 1998).

There is, in fact, a dearth of authority to support the proposition that conducting an investigation to disclose exculpatory evidence or additional evidence to corroborate a claim stays the running of any limitations period. Fermin v. United States, 2000 U.S. Dist. LEXIS 413, *8 (S.D.N.Y Jan. 6, 2000). "Section 2244(d)(1)(D) does not convey a statutory right to an extended delay, in this case more than seven years, while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim." Bell v. Herbert, 476 F. Supp. 2d 235, 243 (W.D.N.Y. 2007), citing Lucidore v. New York State Div. of Parole, No. 99 Civ. 2936 (AJP), 1999 U.S. Dist. LEXIS 11788, 1999 WL 566362, at *5 (S.D.N.Y. Aug. 3, 1999), Flanagan v. Johnson, , 154 F.3d 196, 198-99 (5th Cir. 1998), aff'd, 209 F.3d 107 (2d Cir. 2000), cert. denied, 531 U.S. 873, 121 S. Ct. 175, 148 L. Ed. 2d 120 (2000); accord Hector v. Greiner, 2000 U.S.

Dist. LEXIS 12679, *4 (E.D.N.Y. 2000); Foy v. Sabourin, 2004 U.S. Dist. LEXIS 4582, at *3 (S.D.N.Y. 2004); Brown v. Keane, 1998 U.S. Dist. LEXIS 3973, at *3 (S.D.N.Y. 1998).

Accordingly, defendant's claim that he was denied due process by virtue of his claim that the People violated Brady because they withheld from the defense a copy of the 911 tape is untimely. It is also without merit. As detailed by the State Court, the People overwhelmingly put the defense on notice of the existence of the tape, even if the tape itself was not produced. Moreover, at best, defendant's interpretation of the tape would be relevant solely to Mr. Santos' credibility with regard to an incidental aspect of his testimony. However, because Mr. Santos never stated or testified that he connected communicated with a 911 operator, defendant's interpretation of the contents of the tape is *not* inconsistent with the witness's testimony. Therefore, the tape was not Brady material. As the motion court concluded, in light of all these facts and in light of the overwhelming evidence of defendant's identity as the perpetrator, even if the jury were to have learned that, *arguendo*, Mr. Santos' voice is not on the tape, the outcome of the trial would not have differed.

B. Ground: The People Allegedly Withheld Exculpatory Evidence Regarding Witness Adrian Diaz

Defendant claims, in sum and substance, that the People withheld evidence that prosecution witness Adrian Diaz testified pursuant to a secret cooperation agreement pursuant to which the People allegedly protected him from the adverse effects of having violated his parole status by traveling to Puerto Rico and smoking marijuana in return for his testimony against defendant. According to defendant's theory, the People agreed to intervene and did intervene in the matter of Mr. Diaz's probation status, resulting in a two-year extension of his term of probation. This claim is untimely because defendant contends that he learned the factual predicate of this claim on *September 23, 2003*, yet he did not raise it in a collateral state motion to vacate the judgment until March 2006. The claim is also without merit, as found by the State court, because there was no concealed cooperation agreement between the prosecutors and Mr. Diaz.

As discussed in Section I, *supra*, in furtherance of his 2006 motion to vacate, defendant's attorney submitted what he represented to be a recorded September 23, 2003 telephone conversation between defendant – criminally impersonating a law enforcement officer – and witness Adrian Diaz. Assuming the truth and legitimacy of the contents of that recording, defendant had the factual predicate for a claim that the People withheld from the defense at trial exculpatory evidence and lied about the existence of an agreement with Mr. Diaz. Thus, aware of the factual predicate for the claim, it was incumbent upon defendant to exercise due diligence in bringing this claim in State court, but defendant instead waited until 2006 to move to vacate the judgment on this ground. See § 2244(d)(1)(D), which serves only to delay the accrual of the

one year limitations period until the date on which the "factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence."

Defendant contends that the raising of Brady and prosecution misconduct claim in the instant petition is timely because he required more than 2-1/2 years to develop evidence that the People had withheld this information from the defense and that the withheld information materially prejudiced him. According to defendant, "the factual predicate for [the] Brady claims arose in June 2005 – when [he] became aware of facts sufficient to challenge Oliva's [trial] testimony" by corroborating the existence of a secret agreement. As detailed in Section IIA, *supra*, the statute of limitations is not tolled by the conduct of such investigations conducted after the acquisition of the factual predicate for the claim. Furthermore, as discussed above, none of the so-called evidence unearthed by defendant during the time period corroborated his theories.

Defendant's recourse to equitable tolling is ultimately unpersuasive. Although "in rare and exceptional circumstances a petitioner may invoke the courts' power to equitably toll the limitations period," Belot v. Burge, 490 F.3d 201, 205 (2d Cir. 2007) (quotation marks omitted), a petitioner seeking equitable tolling must also demonstrate that he exercised reasonable diligence throughout the period he seeks to toll. Rodney v. Breslin, 2008 U.S. Dist. LEXIS 43438, 11-12 (E.D.N.Y. June 3, 2008); Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000). Assuming, *arguendo*, that petitioner required additional time to investigate his claim before including it in a motion to vacate, he offers no explanation for why he then nevertheless chose to present it in the curiously bare-boned manner in which he did in March 2006, omitting an affidavit by defendant, failing to explain why he had not sought an affidavit by Mr. Oliva to corroborate the bona fides of the recorded conversation, and relying instead upon little more than his attorney's statements of belief. Although defendant then – 9 months later – submitted his

own affidavit and one purportedly by Mr. Oliva, the timing of those submissions undermine his contention that the delay between his acquisition of the recording and the filing of the initial motion in March 2006 was attributable to his good-faith due diligence.

Finally, defendant's attempted recourse to the principle of equitable tolling to salvage this untimely claim is an affront to the concept of equity. Defendant's delayed in filing his motion in order to avoid prosecution for the crimes he and/or others known to him committed in obtaining the evidence that he submitted to the State court – not only Criminal Impersonation, but also Forgery and Offering False Instruments for Filing relating to the mechanism through which defendant perpetrated a fraud upon a court in order to obtain Mr. Diaz's presentence report. See Point I, *supra*. Equity cries out for the dismissal of defendant's petition insofar as it grounded upon this claim, which relies upon that same evidence, and which is ultimately utterly without merit for all the reasons set forth in the State court's decision.

C. Ground: The People Allegedly Withheld Exculpatory Evidence Regarding Witness Edwin Oliva

With regard to his claim that the People failed to disclose coercive threats and a secret agreement by which they compelled witness Edwin Oliva to testify at defendant's trial, defendant contends that he could not have raised the claim earlier than his March 2006 motion to vacate because "stonewalling by state officials frustrated his efforts until he was able to secure Oliva's consent to the release of his Oliva's Legal Aid and Corrections files in June 2005" (Defense Memo. at 32). Defendant offered no proof that he obtained Mr. Oliva's "consent" in June 2005. In fact, the People established and the motion court found that it was likely that Mr. Oliva had been duped by defendant with the assistance of an attorney consulted and paid by defendant himself. In any event, defendant did not establish through the sworn submission of either defendant, Mr. Oliva, or Mr. Oliva's purported attorney that such "consent" was given or when it was allegedly given. In the absence of such a showing, defense counsel's asserted reliance upon the specified date to prove the timeliness of his petition is insufficient to satisfy defendant's burden.

Moreover, as with defendant's other claims, his reliance upon equitable tolling contingent upon the alleged obstructive tactics of state agencies is unpersuasive. The agencies acted within the law in declining to turn over to the incarcerated defendant files and records pertaining to witnesses who testified against him at his trial. Furthermore, and as found by the motion court, the documentary evidence that defendant discovered through highly questionable means were sufficient solely to allow defendant to cobble together a red-herring claim of prosecutorial misconduct. The acquisition of such evidence through illicit means should not suffice to re-start the statutory period.

III

DEFENDANT'S CLAIM THAT THE PEOPLE WITHHELD EXCULPATORY EVIDENCE REGARDING TRIAL WITNESS ANGEL SANTOS BY ALLEGEDLY WITHHOLDING A RECORDING OF 911 CALLS FROM THE DEFENSE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant asserts that sometime in 1997 he acquired from Respondent a copy of the 911 tape pursuant to a series of pro se FOIL request. Then, although defendant pursued in February 1997 a pro se motion to vacate the judgment grounded upon claims of ineffective assistance of counsel and People's alleged failure to disclose Brady material, defendant did not include in that motion or in the ensuing direct appeal a claim that the People withheld the 911 tape. Defendant included this Brady claim in his March 2006 motion to vacate, and he moved in April 2006 for the motion court to consider it in the context of a "renewal" of the 1997 motion.

The People established that the Criminal Procedure Law does not allow for such a renewal, and that defendant's claim must be considered in the context of a second, successive motion to vacate. The People then argued that the 2006 motion should be dismissed C.P.L. § 440.10(3)(c), because defendant could have included it in his 1997 motion, and that it should be further dismissed pursuant to C.P.L. § 440.30(1), (4)(b)(d) because defendant had failed to substantiate, through sworn allegations, all factual allegations necessary to support the stated ground.[30]

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[30] Indeed, the March 15, 2006 motion did not contain either an affidavit by defendant or an affirmation by his trial counsel, Attorney Harrison, attesting under penalty of perjury to the facts alleged by Attorney Rudin, namely that the People withheld the 911 tape. As detailed in the People's Initial Response, Attorney Harrison informed the undersigned that he would testify for

The motion court concurred with the People's position. First, the court denied the motion to renew the 1997 motion to vacate because there was no statutory authority for granting such relief. Second, the court went on to find that defendant's 911 Brady claim was procedurally barred pursuant to C.P.L. § 440.10(3)(c), because defendant had not established that he was not in a position to include the Brady claim in his first motion to vacate. Third, the court concluded the claim was further barred procedurally pursuant to C.P.L. § 440.30(4)(b), (d).[31]

Defendant contends that no deference should be accorded to the determination of the motion court that the claim is procedurally barred because, "The state court's rejection of the Santos claim for procedural default is ambiguous . . . [because it] did so in a section of its opinion discussing Petitioner's motion to renew his previous C.P.L. § 440.10 motion, which had been denied in June 1997. . . . It is not clear whether the state court meant that Petitioner had procedurally defaulted any right to renew his prior motion, or that he also had defaulted his right to bring his new, substantive claim" ((Def. Memo. at 14). No such ambiguity can be reasonable imputed to the motion court's decision, which first rejects the motion to renew as unfounded and then goes on to find the claim, as included in defendant's March 2006 motion to vacate,

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the People in opposing the defense motion insofar as it accused him of ineffective assistance if he were subpoenaed to testify at an evidentiary hearing, at which time he would be relieved from the constraints of attorney-client privilege. To the extent that the defense contended that Attorney Harrison could have corroborated critical factual represention contained in Attorney Rudin's papers, defendant Collins could have relieved Attorney Harrison from the constraints of the privilege and secured from him an affirmation. Defendant Collins did not do so, and he submitted nothing from Attorney Harrison in any supplemental filing. .

[31] The court declined to attribute the procedural default under C.P.L. § 440.30 to the failure of defendant to procure an affirmation from trial counsel supporting his contention that the tape was not produced in view of the on-record evidence that clearly would have belied such a claim: "Even if trial counsel submitted an affidavit, it would not necessarily be sufficient to require a hearing. See, People v. Bacchi, 186 A.D.2d 663 (2d Dep't 1992) (citing, People v. Brown, 56 N.Y.2d 242 [1982]) (defense counsel's conclusory allegation that he "verily believed" that the People failed to gurn over a police report was insufficient to raise a triable issue of fact").

procedurally barred pursuant to express provisions of C.P.L. § 440.10(3) and 440.30(4), which apply exclusively to the right of a motion court to deny summarily a claim advanced in a motion to vacate.

When a state court holding contains such a plain statement that a claim is procedurally barred then the federal habeas court may not review it, even if the state court also rejected the claim on the merits in the alternative. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Wainwright v. Sykes, 433 U.S. 72, 81-90 (1977) (A federal court, when reviewing a habeas petition from a state prisoner, cannot consider the merits of a federal constitutional claim when the state court has rejected the claim on the basis of an adequate and independent state ground); see also Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court"); Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) (a state court need not fear reaching the merits of a federal claim in an alternative holding so long as it explicitly invokes a state procedural rule as a separate basis for its decision); Glenn v. Bartlett, 98 F.3d 721, 724-25 (2d Cir. 1996) (same); Phillips v. Smith, 717 F.2d 44, 48, 50-51 (2d Cir. 1983), cert. denied, 465 U.S. 1027 (1984) (same).

The Supreme Court has made clear that the adequate and independent state ground doctrine applies on federal habeas, such that "an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, *unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice*." Harris v. Reed, 489 U.S. 255, 262 (parallel citations, case citations & internal quotations omitted; emphasis added).

To establish cause for a procedural default, a defendant must show "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Amadeo v. Zant, 486 U.S. 214, 222, quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). To establish prejudice resulting from the procedural default, a defendant must show that the alleged error worked to the defendant's actual and substantial disadvantage, not simply that there was a possibility of prejudice. United States v. Frady, 456 U.S. 152, 170 (1982). Furthermore, the prejudicial effect of the alleged error should be viewed, not in isolation, but in the context of the entire trial and, to warrant habeas review, must have infected the "entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. at 170.

Defendant does not meet either prong of the cause and prejudice test, nor has he established that his case falls into the extremely rare category where a "fundamental miscarriage of justice" has occurred, in that a constitutional violation has probably caused the conviction of an innocent person. Murray v. Carrier, 477 U.S. at 495-96, 106 S. Ct. at 2649.

According to defendant, he could not have included his 911 Brady claim in his 1997 motion because he had not yet obtained a copy of that tape pursuant to a FOIL request and, although the existence of the tape was established before and during the trial, defendant's trial counsel "had no reason to seek to obtain it absent a disclosure by the prosecutor that it contained exculpatory information. Indeed, petitioner and his attorney had no notice that Santos would claim to have been on the telephone with the 911 operator until he testified at trial, and certainly had no notice that there was a 911 tape that contradicted him (Def. Memo. at 14-15).

This argument is based upon a series of false and misleading presumptions. It presupposes that the People did not provide trial counsel with the tape; a fact that the defense has not proven and

that the People deny. It also presupposes that a knowledge of the contents of the tape was a necessary prerequisite to advancing a Brady claim, which could simply have been grounded upon a failure to produce the tape itself. This argument further presupposes that the tape contains exculpatory information, which the People deny and which the motion court – having had the opportunity to review the tape – concluded that defendant had failed to establish either that he had not received it or that it was material evidence such that, if produced, would have resulted in the reasonable probability of a different verdict.

This latter conclusion is supported by the fact that Angel Santos testified that he went inside a furniture store intending to call 911 when he observed defendant through the front and side windows of the store flee from the crime scene. Mr. Santos *never stated or testified that he connected with or spoke to a 911 operator.*[32] The fact that the People did not provide the defense with a copy of the tape as Rosario material – documenting a prior statement by Mr. Santos – is further proof that the People did not mislead the defense at trial regarding the contents of the tape. The absence of any actual inconsistency between the tape and Mr. Santos's testimony totally undermines defendant's conclusory assertion that the tape constituted Brady material and that he was prejudiced by the alleged withholding of the tape because with it he could have established at trial that Mr. Santos falsely testified that he "observed [defendant] running from the crime scene while he was on the phone with a 911 operator" (Def. Memo. at 22). Mr. Santos *never* offered such testimony, resulting in the tape being neither exculpatory nor impeachment evidence. Furthermore, even if Mr. Santos had so testified, the failure of the 911 tape to corroborate him as to such an

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[32] Defendant – who possesses the trial transcript and all Rosario material related to Mr. Santos – necessarily knows this to be true. Yet, he persists in voicing the baseless allegation that the "prosecution knew that Santos had committed perjury and was required to correct his

incidental fact would not have been material evidence, because there is no reasonable probability that disclosure of the tape would have resulted in a different verdict in view of the nature of the impeachment and the other evidence of defendant's guilt.

Defendant also contends that the usual presumption of correctness and deference to the state court factual determinations with regard to merits of this and other claims do not apply because the motion court did not conduct an evidentiary hearing (Def. Memo. at 6). A holding on the merits such as that made by the motion court in alternative to its procedural determination is a merits determination entitled to AEDPA deference. See Hawkins v. Costello, 460 F.3d 238 (2d Cir. 2006); Jimenez v. Walker, 458 F.3d (2d Cir. 2006) (in which the Second Circuit held that deference under 28 U.S.C. § 2254(d) ("AEDPA") is owed to a state court decision that disposes of a federal claim by holding the claim to be either unpreserved for appellate review or meritless).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court cannot grant a writ of habeas corpus to a state prisoner on the basis of a claim that was adjudicated on the merits in a state court unless the adjudication of the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 405-06 (2000). In Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001), this Court held that a constitutional claim has been "adjudicated on the merits" in state court, and therefore is entitled to deference under section 2254(d), when the state court "(1) disposes of a claim 'on the merits,' and (2) reduces its disposition to a judgment."

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testimony regardless of whether Petitioner's attorney was at fault for not requesting the 911 tape"

Nowhere is there a requirement for an evidentiary hearing, and no further articulation of its rationale or reasoning process is required. Id. at 312; see Eze v. Senkowski, 321 F.3d 110, 121-22 (2d Cir. 2003); In re Byrd, 269 F.3d 561 (6th Cir. 2001). The cases cited by defendant in support of the posited unilateral rule that the "usual presumption of correctness and deference to state court factual determinations does not apply where the state court has failed to hold an evidentiary hearing" (Def. Memo. at 6), instead hold that under the particular circumstances presented, it was that a hearing be conducted. See, e.g., Drake v. Portuondo, 321 F.3d 338 (2d Cir. 2003) (remanding petition to District Court for a hearing because it was unclear from the Appellate Division's decision denying a direct appeal from the judgment upon what facts it based its conclusion that "the prosecution was aware, or should be charged with knowledge that [Walter] was misrepresenting his credentials"); Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) (where the trial court did not conduct any inquiry in response to allegations of juror misconduct before denying motion to set aside verdict, and where no state appellate court had upheld conviction against challenge on the same ground based solely upon the trial record).

Here, the proceeding undertaken by the motion court was fundamentally fair, allowing both parties an opportunity to submit documentary and other evidence in support of their respective positions. Moreover, the motion court's lengthy decision manifests that it reviewed the entirety of both parties' submissions in reaching its decision.

A state's failure to use certain procedures, such as holding an evidentiary hearing on a particular issue, violates due process only "if [the procedures] '"offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Hines v. Miller, 318 F.3d 157, 161-62 (2d Cir. 2003). Federal courts have expressly refused to

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(Def. Memo. at 16).

find any constitutional violation in the conduct of a C.P.L. § 440 motion consideration without an evidentiary hearing, and have further held that such a claim is not cognizable on federal habeas review. See Tracy v. Warden, 2008 U.S. Dist. LEXIS 44102 (N.D.N.Y June 1, 2008) ("Although the Second Circuit does not appear to have explicitly ruled on this issue in a published decision, district court decisions within this circuit have routinely denied applications for habeas relief for this reason. See, e.g., Page v. Mantello, No. 98-CV-1916 [N.D.N.Y. Dec. 4, 2002], slip op. at 41-42 [Peebles, M.J], adopted, Page v. Mantello, No. 98-CV-1916 [N.D.N.Y. Apr. 16, 2003], appeal dismissed, Page v. Mantello, No. 03-2342 [2d Cir. June 1, 2004]; see also Jones v. Duncan, 162 F. Supp. 2d 204, 219 [S.D.N.Y. 2001] [petitioner's "assertion that the failure to hold a hearing on his CPL §§ 440.10 and 330.30 … motions violated due process is not cognizable on federal habeas review"]; Sparman v. Edwards, 26 F. Supp. 2d 450, 468 n.13 [E.D.N.Y. 1997], aff'd, 154 F.3d 51 [2d Cir. 1998]).

Finally, there is simply no truth to defendant's argument that the motion court's finding that defendant was not, in any event, prejudiced if he did not, in fact, obtain the 911 tape for use at his trial was reached "without any analysis whatsoever" (Def. Memo. at 23). Nor was that conclusion contrary to and unreasonable application of applicable Supreme Court precedent such as would trigger de novo review by this Court.

The motion court, citing the existence of overwhelming evidence of defendant's guilt, concluded, "Even if the 911 recording was not provided to trial counsel, defendant has not demonstrated that a 'reasonable possibility [exists] that failure to disclose the material contributed to the verdict'" (Decision at 44-45, 27-28, citing People v. Jackson, 78 N.Y.2d 638, 639 (1981). In so concluding, the motion court was unequivocally referencing its own summary of the evidence that preceded its consideration of the particular claims. That summary makes

clear that and why the court's conclusion was fully supported by the record and why its conclusion that no arguable prejudice would have resulted from any failure to disclose the 911 tape was not contrary to nor an unreasonable application of applicable Supreme Court precedent

Accordingly, this Court should not review defendant's habeas claim regarding the People's alleged withholding of exculpatory evidence because it is procedurally barred from habeas review due to the defendant's state court default. The claim is also meritless: The People did not withhold any evidence from the defense relating to the 911 calls, and the tape did not, in any event, contain Brady material impeaching the testimony of witness Angel Santos.

IV

THE REST AND REMAINDER OF DEFENDANT'S CLAIMS REGARDING THE ALLEGED WITHHOLDING OF EXCULPATORY EVIDENCE RELATED TO ADRIAN DIAZ AND EDWIN OLIVA ARE WITHOUT MERIT.

With regard to the merits of defendant's Brady and prosecutorial misconduct claims involving witness Adrian Diaz and Edwin Oliva, there is also no merit to defendant's contention that the motion court arbitrarily rejected "petitioner's sworn and documentary evidence, as well as the State's admissions, and drew unreasonable conclusions from the evidence it did consider" (Def. Memo. at 9). As detailed in Point I, defendant's evidence constituted a fraud upon the motion court, and defendant's argument that the "state court had no reasonable basis for discrediting it" (Def. Memo. at 9) is spurious, because the motion court made clear and rational factual findings that such a fraud had been perpetrated. Furthermore, despite defendant's repeated references to the People's alleged admissions of the truthfulness and accuracy of defendant's allegations, no such admissions were made. The People repeatedly denied the accusations and asserted, and the motion court correctly found based upon the evidence submitted by the People, that there were no secret cooperation agreements with these witnesses, whose testimony was voluntary and uncoerced.

Likewise, and for the reasons set forth in Point III, supra, there is no merit to defendant's claim that no deference should be accorded to the motion court's determination that no prejudice resulted to defendant. Because the court found no credible evidence that there had been a secret cooperation agreement with either Mr. Diaz or Mr. Oliva, and because the court found that the People did not withhold such non-existent evidence from the defense, the court found that defendant had – necessarily – failed to establish that he had been prejudiced. Because there was no Brady error, the court correctly concluded, there was no derivative prejudice. The State court's findings

and conclusions with regard to these findings and conclusions must be accorded due deference. Defendant's contentions to the contrary are predicated upon the assumption that his claims were meritorious; however, the motion court correctly determined to the contrary and its decision was not contrary to Supreme Court precedent.

A decision is "contrary to" Supreme Court precedent only if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A decision is "an unreasonable application" of Supreme Court precedent only if defendant shows that it is "objectively unreasonable." To do so, the defendant must identify "some increment of incorrectness beyond error." Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000).

Here, defendant does little more than quibble with details of the motion court's factual findings, when nothing established by defendant made out a violation of the rule announced in Brady v. Maryland, 373 U.S. 83, 87 (1963), which is based upon the due process requirement of a fair trial. See United States v. Bagley, 473 U.S. 667, 675-76 (1985); United States v. Agurs, 427 U.S. 97, 108 (1976). The Brady rule creates a prosecutorial obligation of fairness, but it does not displace the adversarial system by creating a constitutional right of discovery. Bagley, 473 U.S. at 675-76; Weatherford v. Bursey, 429 U.S. 545, 559 (1977); see Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992) (purpose of Brady rule is not to supply defendant with all information that might assist in preparation of his defense, but to assure that defendant will not be denied access to exculpatory information only known to the Government).

The motion court correctly held defendant to satisfying the rule that that, in order to find a Brady violation, three requirements must be satisfied. First, "the evidence at issue must be

favorable to the accused, either because it is exculpatory, or because it is impeaching." United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002) (quoting Stricker v. Greene, 527 U.S. 263, 281-82 (1999)). Second, "that evidence must have been suppressed by the State, either willfully or inadvertently." Third, "prejudice must have ensued." Id.; United States v. Madori, 419 F.3d 159, 22-23 (2d Cir. 2005). A defendant is prejudiced where the undisclosed evidence is material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682. See Kyles v. Whitley, 419 U.S. 514 U.S., 421-22 (1995) (same); Agurs, 427 U.S. at 106, 112 (for Brady to be violated, undisclosed evidence must be material to defendant's guilt or punishment); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (for Brady to be violated, undisclosed impeachment evidence must be material).

The hearing court, assuming arguendo that defendant was correct that a reasonable possibility standard applied in lieu of the reasonable probability standard, concluded that defendant had failed to establish that a Brady violation occurred, because the State did not suppress *any* evidence, much less evidence that tended to show that defendant was not guilty and/or such that impeached a key prosecution witness. The Supreme Court has never held that the Brady rule imposes a duty on the State to disclose information that is not exculpatory, but that is or may be merely helpful to defendant, in that it might assist defendant in the preparation of his defense. See Moore v. Illinois, 408 U.S. 786, 795 (1972) ("no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police and investigatory work on a case"); United States v. Middlemiss, 217 F.3d 113, 123 (2d Cir. 2000)

(Brady "does not require the government to disclose all evidence in its possession that might assist defense preparation").

With regard to defendant's claims that the prosecution team elicited perjured testimony, failed to correct false testimony, and lied about the evidence on summation, the hearing court correctly concluded that the claims were unfounded.

The Supreme Court has held that for a defendant to successfully to make out a case of prosecutorial misconduct, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Rather, the relevant inquiry is whether "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). See also Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991) (quoting Donnelly, 416 U.S. at 643) (it is well-settled that the propriety of comments made by a prosecutor on summation generally does not present a federal constitutional question). Thus, a defendant seeking habeas relief premised upon alleged prosecutorial misconduct faces a heavy burden. To prevail on a claim of prosecutorial misconduct in both Federal and New York State, a defendant must demonstrate that the prosecutor's improper remarks caused him "substantial prejudice." See, e.g., United States v. Bautista, 23 F.3d 726, 732 (2d Cir. 1994). Bradley v. Meachum, 918 F.2d 338, 343 (2d Cir.), cert. denied, 501 U.S. 1221 (1990); United States v. Tutino, 883 F.2d 1125, 1136 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990); United States v. Nersesian, 824 F.2d 1294, 1327 (2d Cir.), cert. denied, 484 U.S. 957 (1987).

Here, because the prosecutor did not misstate the evidence or otherwise err in the manners alleged by defendant, the hearing court correctly found to be without merit the claim that defendant was denied his due process right to a fair trial. The prosecutor's remarks did not

infect the trial with unfairness, particularly because the court gave curative instructions that mitigated any prejudice. See Gonzalez v. Sullivan, supra, 934 F.2d at 424 (besides sustaining objection to prosecutor's voucher of witness's truthfulness, trial court took curative action, instructing jury that summations were not evidence and that jury was sole judge of the facts; prosecutor's summation did not render the trial fundamentally unfair). Indeed, the prosecutor's remarks -- which are discussed by Respondent in the submission contained in Appendix I -- were responsive to the defense summation and its attacks on the credibility of the State's witnesses and they were appropriate. See United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994) (government may respond to a defense argument that attacks the credibility of government witnesses); Ayala v. Ercole, 2007 U.S. Dist. LEXIS 28341 at *52-53 (E.D.N.Y. Apr. 17, 2007) ("[A] prosecutor is permitted to respond in an appropriate manner to attacks on the government's case by defense counsel during his summation, including attacks on the credibility of government witnesses." [collecting cases]); Everett v. Fischer, 2002 U.S. Dist. LEXIS 12075 at *8 (E.D.N.Y. July 3, 2002) (prosecutor's comments as to the credibility of government witnesses a "fair response" to defense counsel's attack on the credibility of those witnesses); Shariff v. Artuz, 2001 U.S. Dist. LEXIS 1535 at *25 (S.D.N.Y. Feb. 16, 2001) ("Although the government may not vouch for a witness's credibility, it may respond to an argument that impugns the government's integrity or the integrity of the case."); Ramos v. Keane, 1994 U.S. Dist. LEXIS 3400 at *12 (S.D.N.Y. Mar. 23, 1994) ("[A] prosecutor may present what . . . amounts to a boisterous argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon the government or its witnesses." [internal quotation marks and citation omitted]); see also Santiago v. Rivera, 2007 U.S. Dist. LEXIS 91436 at *14-16 (E.D.N.Y. 2007) (rejecting vouching claim); Simms v. Moscicki, 2006 U.S. Dist. LEXIS 59932

at *74, n.45 (S.D.N.Y. 2006) (same) Rosario v. Walsh, 2006 U.S. Dist. LEXIS 33385 at *89 n.44 (S.D.N.Y. May 25, 2006) (same).

In full support of the correctness of the hearing court's determinations, the People will rely upon the court's decision and upon the contents of the People's submissions to that court, as outlined in Respondent's Affidavit in opposition to the instant petition.

CONCLUSION

FOR ALL THE REASONS SET FORTH ABOVE, DEFENDANT IS NOT ENTITLED TO HABEAS CORPUS RELIEF.

Dated: Brooklyn, New York
August 28, 2008

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 28, 2008, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following party:

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